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# Starting Down the Road to Reform: Kentucky's New Long-Arm Statute for Family Obligations

BY LOUISE EVERETT GRAHAM\*

## INTRODUCTION

Kentucky has long needed a comprehensive family law provision for its long-arm statute.<sup>1</sup> Before the general long-arm statute was amended by the 1992 General Assembly, it addressed only a narrow class of paternity cases among its specific jurisdictional provisions,<sup>2</sup> ignoring the need for long-arm jurisdiction in other domestic relations cases. A second long-arm statute<sup>3</sup> provided jurisdiction over some nonresidents to establish or enforce child support obligations. In the contexts of divorce and child support, Kentucky's failure to claim constitutionally available jurisdiction deprived Kentucky residents of important protection.

A Kentucky court's power to grant a divorce depends on fulfillment of a significant residency requirement by either the petitioner or the respondent.<sup>4</sup> Satisfaction of the residency requirement permits a Ken-

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<sup>1</sup> KY. REV. STAT. ANN. § 454.210 (Michie/Bobbs-Merrill 1985 & Supp. 1992).

<sup>2</sup> See *id.* § 454.210(a)(8). The paternity long-arm section provides for personal jurisdiction over a defendant who commits sexual intercourse in this state and thereby causes the birth of a child if 1) both of the child's parents are Kentucky domiciliaries, 2) there is a repeated pattern of intercourse between the parents in Kentucky, or 3) the intercourse is a tort or crime in Kentucky. *Id.* Jurisdiction based solely on the statute is limited to claims arising from the statutorily enumerated acts. *Id.* § 454.210(2)(b). The "arising from" limitation does not mean that child support cannot be established in a paternity suit. Another statute provides that "the liabilities of the father may be enforced in the same or other proceedings," referring to either establishment or acknowledgment proceedings. *Id.* § 406.021(3) (Michie/Bobbs-Merrill 1984 & Supp. 1992). The statutory reference to "other proceedings" probably means that a failure of the court that establishes paternity to provide child support does not bar a court from ordering support in a subsequent proceeding. Taken together, the two statutes permit a Kentucky court to establish paternity and order support for children who were conceived and born in Kentucky when the putative father cannot be served personally in the state.

<sup>3</sup> *Id.* § 454.275 (Michie/Bobbs-Merrill 1985).

<sup>4</sup> Kentucky's divorce statute requires a petitioner to demonstrate that one of the parties maintained a residence in Kentucky for 180 days immediately before the filing of the divorce petition. *Id.* § 403.140(1)(a) (Michie/Bobbs-Merrill 1984). Cf. UNIF. MARRIAGE AND DIVORCE ACT

tucky court to dissolve the marriage, but it does not necessarily follow that the Kentucky court has the power required to resolve all disputes related to the "incidents of marriage."<sup>5</sup> In order to render a binding adjudication on issues such as property division and spousal support, the court must have personal jurisdiction over both spouses.<sup>6</sup> In some cases, Kentucky could not constitutionally assert jurisdiction over a nonresident respondent who lacked connections to the state.<sup>7</sup> In other instances, however, the absent respondent

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§ 302(a)(1), 9A U.L.A. 181 (1973) (90-day residency requirement). Residency requirements of one year have been held constitutional. *Sosna v. Iowa*, 419 U.S. 393 (1975). If the defendant's presence in the state satisfies the residency requirement, there is no jurisdictional issue. The petitioner spouse consents to the court's jurisdiction, *Becker v. Becker*, 576 S.W.2d 255 (Ky. App. 1976), and the defendant spouse's connection to Kentucky is presumed to be sufficiently akin to domicile to permit the suit to be brought. See LOUISE GRAHAM & JAMES E. KELLER, KENTUCKY DOMESTIC RELATIONS LAW § T3.02(A) (1991) (discussing "residence" and "domicile" as distinct legal terms); see also *infra* notes 39-55 and accompanying text. Kentucky courts have struggled with the appropriate meaning of the residency requirement. Although the statutory language appears to address actual residence, either actual residence or proof of domicile is required in the case of temporary absence from the state. Kentucky courts have long permitted temporarily absent domiciliaries to bring divorce actions in the state without showing that they were actually present in Kentucky for the required statutory period. See *McGowan v. McGowan*, 663 S.W.2d 219 (Ky. Ct. App. 1983) (parties absent from the state while husband attended professional school); *Broadus v. Broadus*, 280 S.W.2d 144 (Ky. 1955) (husband absent from Kentucky to attend college); *Russell v. Hill*, 256 S.W.2d 508 (Ky. 1953) (husband absent on military duty).

<sup>5</sup> See, e.g., *In re Marriage of Booker*, 833 P.2d 734, 737 (Colo. 1992) (absent personal jurisdiction over defendant, court could not divide military pension as marital property); *Smith v. Smith*, 459 N.W.2d 785, 788 (N.D. 1990) (finding that court could grant divorce but not alimony without personal jurisdiction over defendant); *In re Marriage of Anderson*, 793 P.2d 1378, 1379 (Or. Ct. App. 1990) (refusing to allow California court without personal jurisdiction over divorce defendant to settle property and child support issues); see also *infra* notes 56-82 and accompanying text. Kentucky recognizes this lack of power in two ways. First, KY. REV. STAT. ANN. § 403.140(1)(d) (Michie/Bobbs-Merrill 1984) requires a court to consider child support, maintenance, and property division to the extent that it has jurisdiction to do so. Second, the Kentucky statutes on property division and maintenance contemplate proceedings that provide for property division or maintenance after a divorce has been granted in another forum. The property division statute authorizes action "in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property." *Id.* § 403.190(1) (Michie/Bobbs-Merrill 1984 & Supp. 1992). The maintenance statute applies to a "proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse." *Id.* § 403.200 (Michie/Bobbs-Merrill 1984). At the time the property division statute was drafted, jurisdictional doctrine treated the presence of a party's property in the state as a sufficient nexus for determination of rights in that property. Subsequent developments have changed that rule, rendering obsolete the statutory language "or lacked jurisdiction to dispose of the property" in Kentucky Revised Statutes § 403.190(1). See *Shaffer v. Heitner*, 433 U.S. 186 (1977) (limiting a state's personal jurisdiction over defendant that derives from ownership of property within that state to cause of action related to the property). But see *Gaines v. Gaines*, 566 S.W.2d 814 (Ky. Ct. App. 1978) (indicating, in dictum, that physical location of property in Kentucky may give jurisdiction).

<sup>6</sup> See *infra* notes 56-82 and accompanying text.

<sup>7</sup> See *Kulko v. Superior Court*, 436 U.S. 84, 94 (1978) (holding that state of child's residence lacks jurisdiction over defendant who has no other contacts with that state).

had constitutionally sufficient connections with the state and yet could not be served personally in Kentucky. In this latter case, Kentucky could not claim long-arm jurisdiction over the respondent *only* because the state lacked an adequate long-arm statute.<sup>8</sup>

The absence of adequate long-arm provisions also impaired Kentucky's ability to enforce child support obligations. Like many other states, Kentucky has faced a growing number of children whose absent parents fail to provide adequate support.<sup>9</sup> Kentucky Revised Statutes section 454.275 provided long-arm jurisdiction over some absent respondents, but its reach was limited to cases in which the obligor had been married to the custodial parent, and it also required proof that the obligor had left the state to avoid payment of the obligation.<sup>10</sup> When a case did not fit this scenario and did not fall within the long-arm rules related to paternity,<sup>11</sup> Kentucky courts were unable to

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<sup>8</sup> See KY. REV. STAT. ANN. § 454.210(2)(b) (Michie/Bobbs-Merrill 1985 & Supp. 1992) (limiting statutory jurisdiction to enumerated acts).

<sup>9</sup> National statistics have long demonstrated that a large number of children living in poverty suffer reduced economic circumstances because of an absent parent's failure to provide support. S. REP. NO. 1356, 93d Cong., 2d Sess. 42 (1974), reprinted in 1974 U.S.C.C.A.N. 8133, 8145. Congress adopted the Child Support Enforcement Amendments of 1984, Pub. L. 98-378, 98 Stat. 1305 (codified as amended at 42 U.S.C. §§ 602-06, 651-71, 1305, 1315, 1396a (1988)), to strengthen child support enforcement. The amendments required that states adopt various measures designed to facilitate their collection of additional support. See H.R. CONF. REP. NO. 925, 98th Cong., 2d Sess. 29, reprinted in 1984 U.S.C.C.A.N. 2447. These included extended statutes of limitation for paternity, *id.* at 37, new collection procedures, *id.* at 30-38, and the development of advisory child support guidelines. *Id.* at 53-54; see KY. REV. STAT. ANN. § 403.212 (Michie/Bobbs-Merrill 1984 & Supp. 1992) (Kentucky child support guidelines). The Family Support Act of 1988, Pub. L. 100-485, 102 Stat. 2343 (codified at 42 U.S.C. §§ 405, 503-04, 602-704, 1301-97 (1988)), amended the Child Support Enforcement Amendments, requiring that the child support guidelines in each state create a rebuttable presumption that the guidelines establish the appropriate amounts to be awarded. S. REP. NO. 377, 100th Cong., 2d Sess. 2, 17-19 (1988), reprinted in 1988 U.S.C.C.A.N. 2776, 2779, 2794-96; H.R. CONF. REP. NO. 998, 100th Cong., 2d Sess. 91-92 (1988), reprinted in 1988 U.S.C.C.A.N. 2879-80. Collection of child support obligations is particularly difficult when the case involves a child support recipient in one state and an obligor in another state. Recent testimony before Congress indicated that 14 million child support cases existed at the time of hearing. Interstate child support cases represented 35% of that total, but only six percent of the child support collections came from interstate cases. *Criminal Penalty for Flight to Avoid Payment of Arrearages for Child Support: Hearings on H.R. 1241 Before the Subcommittee on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102 Cong., 2d Sess. 28 (1992) [hereinafter *Hearings*] (testimony of Harry W. Wiggans, Director, Virginia Department of Social Services Division of Child Support Enforcement). See generally Harry B. O'Donnell IV, *Title I of the Family Support Act of 1988—The Quest for Effective National Child Support Enforcement Continues*, 24 J. FAM. L. 149 (1990-91) (suggesting further legislative improvements); Sue Nations, *Louisiana's Child Support Guidelines: A Preliminary Analysis*, 50 LA. L. REV. 1057 (1990) (evaluating the theoretical model of child support guidelines and examining legislative provisions); Patricia G. Tjaden et al., *Will These Children Be Supported Adequately? The Impact of Current Guidelines*, 28 JUDGE'S J. NO. 4, Fall 1989, at 4 (discussing current child support guideline models).

<sup>10</sup> See *Tally v. Tally*, 603 S.W.2d 486, 487 (Ky. 1980).

<sup>11</sup> See KY. REV. STAT. ANN. § 454.210(a)(8) (Michie/Bobbs-Merrill 1985 & Supp. 1992); *supra*

establish jurisdiction to secure adequate support for children residing in the state.<sup>12</sup>

Recent amendments to Kentucky statutes fill previous gaps and expand Kentucky's jurisdiction in significant ways. This Article addresses Kentucky's jurisdictional expansion in terms of its compliance with traditional minimum contacts analysis and in relation to the effect of developments in national child support policy on future jurisdictional rules. Part I of this Article explains the traditional rules of divorce jurisdiction and the basic concepts underlying those traditions, as well as the constitutional controls on jurisdiction in family law cases. Part II analyzes and explains the provisions of the new long-arm statute.<sup>13</sup> Finally, Part III considers the relationship between jurisdiction, choice of law, and full faith and credit as they relate to state interests in setting child support obligations within a federal system.

## I. HISTORICAL JURISDICTIONAL CONCEPTS

### A. *Ex Parte Divorce, Divisible Divorce, and Child Support*

#### 1. *Marriage Dissolution*

Current students of family law may find it difficult to imagine the era in which a party's right to seek a divorce was limited by a narrow range of substantive grounds. From Kentucky's "no-fault" perspective,<sup>14</sup> divorce is perhaps all too easily available.<sup>15</sup> Fifty years ago, however, this was not the case. In many states, a divorce could be granted only after long separation and only for the most serious reasons.<sup>16</sup> Moreover, even if one spouse could

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note 2 and accompanying text.

<sup>12</sup> Kentucky residents seeking support from nonresident obligors have the option of using the Revised Uniform Reciprocal Enforcement of Support Act [hereinafter "URES A"], KY. REV. STAT. ANN. §§ 407.010-480 (Michie/Bobbs-Merrill 1984). In recent testimony before Congress, however, child support experts commented that a URES A petition was "the last thing" they wished to pursue and that the remedy "takes forever." See *Hearings*, *supra* note 9, at 35-36.

<sup>13</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992).

<sup>14</sup> In Kentucky the sole ground for marriage dissolution is irretrievable breakdown. See KY. REV. STAT. ANN. § 403.170 (Michie/Bobbs-Merrill 1984). Irretrievable breakdown means that there is "no reasonable prospect of reconciliation." *Id.* § 403.170(3). Cf. UNIF. MARRIAGE AND DIVORCE ACT § 302(a)(2), 9A U.L.A. (1973) (using irretrievable breakdown).

<sup>15</sup> Although the United States as a whole experienced a slight decline in divorce rates between 1980 and 1990, Kentucky's divorce rate moved in the opposite direction. In 1980 there were approximately 1,189,000 divorces in the United States. By 1990 the number had fallen to an estimated 1,175,000. In Kentucky, however, the estimates had risen from 16,700 in 1980 to 21,800 in 1990. 1992 STATISTICAL ABSTRACT OF THE UNITED STATES 93.

<sup>16</sup> Kentucky courts of the period noted that marriage was for the life of the parties, and not to be "thrown off for mere whims, or mere frailties or shortcomings" not amounting to moral turpitude.

prove that she was innocent and entitled to the divorce, divorces were sometimes denied because of defenses such as condonation, a form of estoppel that barred a spouse from asserting previously tolerated behavior as a ground for divorce.<sup>17</sup>

The historical importance of jurisdiction in matters of marriage dissolution is related to differences among states in grounds for divorce.<sup>18</sup> If all states had enacted identically narrow divorce grounds, the history of American divorce jurisdiction would probably be different, and perhaps far less significant today. Grounds for divorce were not the same from one state to the next because divorce law was the statutory creature of each state's legislature.<sup>19</sup> Moreover, divorce

Nall v. Nall, 153 S.W.2d 909, 914 (Ky. 1941). Other courts in the same era said that unhappiness was not a ground for divorce. See *Stevenson v. Stevenson*, 30 A.2d 675, 676 (Pa. Super. Ct. 1943). Nor, apparently, were "[s]tinginess, surliness, bad temper, irritability, or uncleanness." *Arnold v. Arnold*, 194 A. 229, 231 (Pa. Super. Ct. 1937). For a general history of American divorce law see HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 12.1 (2d ed. 1988).

<sup>17</sup> Condonation was a defense based on the forgiveness of a prior marital fault on the condition that it would not be repeated. See *Hash v. Hash*, 59 N.E.2d 735, 737 (Ind. Ct. App. 1945). In Kentucky, condonation was not available as a defense if the ground for divorce was cruel treatment. See *Robb v. Robb*, 137 S.W.2d 385, 386 (Ky. 1940).

<sup>18</sup> See generally CLARK, *supra* note 16, § 12.1.

<sup>19</sup> See *Wood v. Wood*, 407 A.2d 282, 285 (Me. 1979). Grounds for divorce continue to vary from state to state. See, e.g., ALA. CODE § 30-2-1(a)(1)-(12) (1989) (grounds range from irretrievable breakdown to faults that include abandonment for one year, imprisonment for two years under sentence of seven or more years, habitual drunkenness or drug addiction, insanity, non-support for two years); ALASKA STAT. § 25.24.050(1)-(9) (1991) (grounds include incompatibility of temperament as well as faults such as personal indignities, adultery, and willful desertion for one year); ARK. CODE ANN. § 9-12-301(1)-(8) (Michie 1991) (grounds range from no fault to impotence, cruel and barbarous treatment, and willful nonsupport); CAL. CIV. CODE § 4506 (West 1983) (irremediable breakdown or incurable insanity); CONN. GEN. STAT. §§ 46b-40-51 (West 1986) (grounds include irretrievable breakdown as well as living apart for 18 months due to incompatibility); FLA. STAT. ANN. § 61.052 (West 1985 & Supp. 1992) (grounds include both irretrievable breakdown and mental incompetence for up to three years); GA. CODE ANN. § 19-5-3(1)-(13) (Michie 1991) (grounds include irretrievable breakdown and traditional fault grounds such as adultery, desertion for one year, mental incapacity at the time of the marriage, cruel treatment, and incurable mental illness); IDAHO CODE §§ 32-603; 32-610 (1983) (includes both irreconcilable differences and five years' separation); ILL. ANN. STAT. ch. 40, para. 401 (Smith-Hurd 1980 & Supp. 1991) (irretrievable breakdown plus traditional grounds such as impotence and adultery); IND. CODE ANN. § 31-1-11.5-3 (Burns 1987) (grounds include irretrievable breakdown and traditional fault grounds such as conviction of a felony, incurable insanity lasting for at least two years, and impotency existing at the time of the marriage); KAN. STAT. ANN. § 60-1601(a) (1983) (grounds include both incompatibility and failure to perform a marital duty or obligation); LA. CIV. CODE ANN. art. 103 (West Supp. 1992) (irretrievable breakdown as well as adultery); ME. REV. STAT. ANN. tit. 19, § 691(1) (West 1991) (irreconcilable differences as well as fault grounds); MD. FAM. LAW CODE ANN. § 7-103 (1991) (grounds include one-year voluntary separation or two years living separate and apart as well as faults including insanity, adultery, or abandonment); MASS. GEN. LAWS ANN. ch. 208, §§ 1, 1A (West 1992) (grounds include both irretrievable breakdown and adultery, desertion for one year, or cruel and abusive treatment); MISS. CODE ANN. §§ 93-5-1, -2 (1972 & Supp. 1990) (grounds

include both irreconcilable differences and faults); MO. REV. STAT. § 452.320 (1986) (irretrievable breakdown for uncontested divorces, but if contested petitioner must show either period of separation or fault); NEV. REV. STAT. § 125.010 (1991) (living separately for one year, incompatibility, and insanity for two years); N.H. REV. STAT. ANN. §§ 458:7, 7-a (1992) (grounds include irreconcilable differences as well as extreme cruelty, absence for two years, or joining a religious sect or society which believes that the relation of husband and wife is unlawful and refusing to cohabit for six months); N.J. STAT. ANN. § 2A:34-2 (West 1987) (grounds include 18 months' separation in different habitation and no reasonable prospect of reconciliation as well as traditional fault such as adultery, willful desertion for 12 or more months, and extreme mental or physical cruelty); N.M. STAT. ANN. § 40-4-1 (Michie 1989) (incompatibility as well as traditional fault grounds such as abandonment or adultery); N.Y. DOM. REL. LAW § 170 (McKinney 1988) (grounds include living apart for one year pursuant to a separation agreement as well as cruel and inhuman physical or mental treatment and other fault-related grounds); N.C. GEN. STAT. §§ 50-5.1, -6 (1987) (grounds include living separate and apart for one year as well as three years' separation because of incurable insanity); N.D. CENT. CODE §§ 14-05-03, -09.1 (1991) (grounds include irreconcilable differences and traditional grounds such as willful neglect, habitual intemperance, and conviction of a felony); OHIO REV. CODE ANN. § 3105.01 (Anderson 1989 & Supp. 1991) (grounds include living separately for one year as well as faults such as bigamy, extreme cruelty, and any gross neglect of duty); OKLA. STAT. ANN. tit. 43, § 101 (West 1990) (grounds include incompatibility and faults such as abandonment for one year, habitual drunkenness, and gross neglect of duty); 23 PA. CONS. STAT. ANN. § 3301 (1991) (grounds include irretrievable breakdown and also fault, such as indignities); R.I. GEN. LAWS §§ 15-5-2, -3 (1988) (grounds include irreconcilable differences as well as extreme cruelty, adultery, or any other gross misbehavior and wickedness that is "repugnant to and in violation of the marriage covenant"); S.C. CODE ANN. § 20-3-10 (Law. Co-op. 1989) (living apart for one year as well as traditional fault grounds such as physical cruelty and habitual drunkenness); S.D. CODIFIED LAWS ANN. §§ 25-4-1 to -18 (1992) (irreconcilable differences and also adultery, extreme cruelty and other fault grounds); TENN. CODE ANN. §§ 36-4-101, -102 (1991) (irreconcilable differences as well as impotence, bigamy, adultery, and other fault grounds); TEX. FAM. CODE ANN. §§ 3.01-.07 (West Supp. 1991) ("marriage has become insupportable because of discord or conflict of personalities that destroys legitimate ends of marriage relationship and prevents any reasonable expectation of reconciliation," as well as living apart for three years and traditional grounds such as cruelty); UTAH CODE ANN. § 30-3-1(3) (1989) (grounds include irreconcilable differences and living apart for three consecutive years under a decree of separate maintenance without cohabitation as well as fault grounds such as physical or mental cruelty); VT. STAT. ANN. tit. 15, § 551 (1989) (grounds include finding that "resumption of marital relationship is not reasonably probable" as well as traditional grounds such as willful desertion or absence); VA. CODE ANN. § 20-91 (Michie 1990 & Supp. 1992) (grounds include living apart as well as adultery, causing apprehension of bodily hurt, and other fault); W. VA. CODE § 48-2-4 (1992) (grounds include irreconcilable differences as well as traditional fault such as adultery, felony conviction, and habitual drunkenness).

Several jurisdictions, including Kentucky, *see supra* note 14 and accompanying text, consider only so-called no-fault grounds. *See* ARIZ. REV. STAT. ANN. § 25-312 (1991) (irretrievable breakdown); COLO. REV. STAT. § 14-10-110 (1987) (same); DEL. CODE ANN. tit. 13 § 1505 (1981) (defining irretrievable breakdown to include some acts of misconduct); D.C. CODE ANN. § 16-904 (1989) (requiring proof of period of separation without reference to fault); HAW. REV. STAT. § 580-41 (1985) (defining "no fault" as either irretrievable breakdown or living apart for specified period); IOWA CODE ANN. § 598.5(7) (West 1981 & Supp. 1991) (irretrievable breakdown); MICH. COMP. LAWS ANN. § 552.6 (West 1988) (breakdown of relationship); MINN. STAT. ANN. § 518.06 (West 1990) (irretrievable breakdown); MONT. CODE ANN. § 40-4-104(b) (1991) (irretrievable breakdown with evidence of separation or serious discord); NEB. REV. STAT. § 42-361 (1988) (irretrievable breakdown); ORE. REV. STAT. §§ 107.025, .036 (irreconcilable differences; doctrine of fault abolished); WASH. REV. CODE § 26.09.030 (1992) (irretrievable breakdown); WIS. STAT. ANN. § 767.12(2) (West 1981 & Supp. 1992) (same); WYO. STAT. §§ 20-2-104, -105 (1987) (irreconcilable

courts did not exercise a choice of law function in determining whether a particular petitioner was entitled to a divorce.<sup>20</sup> If the petitioner qualified for a divorce under forum law, that law supplied the rule of decision.

Just as some states had more liberal grounds for divorce, some had less stringent residency requirements.<sup>21</sup> Unhappily married persons quickly learned that in some cases a divorce that could not be obtained at home could be granted in another state. For example, a married North Carolina storekeeper who had fallen in love with the wife of his clerk

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differences as well as traditional grounds such as insanity).

<sup>20</sup> See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 285 (1971).

<sup>21</sup> Like grounds for divorce, residency requirements continue to vary. See, e.g., ALA. CODE § 30-2-5 (1989) (six-month residence for petitioner where respondent is a nonresident); ARIZ. REV. STAT. ANN. § 25-312 (1991) (state must be either party's domicile or place of military assignment for 90 days before filing); ARK. CODE ANN. § 9-12-307(a)(1) (Michie 1991) (either party must actually be present in state for 60 days before commencement of action and three months before final decree); CAL. CIV. CODE § 4530(a) (West 1983 & Supp. 1993) (either party must have resided in state for six months); COLO. REV. STAT. ANN. § 14-10-106 (West 1987) (90 day residence required); CONN. GEN. STAT. ANN. § 46b-44(c)(1) (West 1986) (one year); DEL. CODE ANN. tit. 13, § 1504 (1981) (six months); D.C. CODE ANN. § 16-902 (1989) (six months); FLA. STAT. ANN. § 61.021 (West 1985 & Supp. 1992) (six months); GA. CODE ANN. § 19-5-2 (Michie 1991) (six months); HAW. REV. STAT. § 580-1 (1985) (six months); IDAHO CODE § 32-701 (1983) (six weeks); ILL. ANN. STAT. ch. 40, para. 401(1) (Smith-Hurd 1980 & Supp. 1991) (90 days); IND. CODE ANN. § 31-1-11.5-6(a) (Burns 1987) (six months); IOWA CODE ANN. § 598.6 (West 1981) (one year); KAN. STAT. ANN. § 60-1603 (1983) (sixty days); LA. CODE CIV. PROC. ANN. art. 10 (West 1960 & Supp. 1992) (six months); ME. REV. STAT. ANN. tit. 19, § 691(2) (West 1991) (six months); MD. FAM. LAW CODE ANN. § 7-101 (1991) (bona fide residency, defined as one year if the cause of action arose outside of state); MASS. GEN. LAW ANN. ch. 208, §§ 4, 5 (West 1992) (accord); MICH. COMP. LAWS ANN. § 552.9 (West 1988 & Supp. 1992) (180 days unless the cause occurred outside of state, then one year); MINN. STAT. ANN. § 518.07 (West 1990) (180 days); MISS. CODE ANN. § 93-5-5 (1972 & Supp. 1990) (six months); MO. REV. STAT. § 452.305(1) (1986) (90 days); MONT. CODE ANN. § 40-4-104(1)(a) (1991) (same); NEB. REV. STAT. § 42-349 (1988) (one year); NEV. REV. STAT. § 125.020 (1991) (six weeks); N.H. REV. STAT. ANN. §§ 458.5, .6 (1992) (one year and cause of action must arise while plaintiff domiciled in state); N.J. STAT. ANN. § 2A:34-10 (West 1987) (one year); N.M. STAT. ANN. § 40-4-5 (Michie 1989) (six months); N.Y. DOM. REL. LAW § 230 (McKinney 1986) (one year unless cause occurs in state and both parties reside in state when suit is filed); N.C. GEN. STAT. § 50-8 (1987) (six months); N.D. CENT. CODE § 14-05-17 (1991) (six months); OHIO REV. CODE ANN. §§ 3105.03, .62 (Anderson 1989 & Supp. 1991) (six months); OKLA. STAT. ANN. tit. 43, § 102 (West 1990) (six months); ORE. REV. STAT. § 107.075 (1991) (six months); 23 PA. CONS. STAT. ANN. § 3104 (1991) (six months); R.I. GEN. LAWS § 15-5-12 (1988) (one year); S.C. CODE ANN. § 20-3-30 (Law. Co-op. 1985) (one year, but three months if both parties reside in state); S.D. CODIFIED LAWS ANN. § 25-4-30 (1992) (must be resident at time of filing); TENN. CODE ANN. § 36-4-104 (1992) (six months); TEX. FAM. CODE ANN. § 3.21 (West Supp. 1991) (six months); UTAH CODE ANN. § 30-3-1(2) (1989) (three months); VT. STAT. ANN. tit. 15, § 592 (1989) (six months); VA. CODE ANN. § 20-97 (Michie 1990 & Supp. 1992) (six months); W. VA. CODE § 48-2-7 (1992) (one year unless for adultery); WIS. STAT. ANN. § 767.05(1m) (West 1981 & Supp. 1992) (six months); WYO. STAT. § 20-2-107 (1987) (60 days). Washington has no residency requirement, although no divorce decree can be issued until 90 days after service upon respondent. See WASH. REV. CODE § 26.09.030 (1992).



found that the divorce unavailable to him in North Carolina could be obtained in Nevada after a short stay in that state.<sup>22</sup>

The initial problems surrounding divorce jurisdiction grew out of movement between states and the clash of conflicting state rules.<sup>23</sup> One issue in determining the limits of state court jurisdiction was the power of the forum state over the absent nondomiciliary spouse. A second, corollary issue was the effect of the divorce forum's judgment in a sister state.<sup>24</sup> A state might grant a petitioner a divorce on the grounds of incompatibility, assuming that as his domicile the forum had sufficient interest in his marital status to control the dissolution of the marriage, but the state in which his former spouse remained domiciled had competing interests in their marital status.<sup>25</sup> In *Williams v. North Carolina* ("Williams I"),<sup>26</sup> the United States Supreme Court recognized that the Due Process Clause might limit state court assertions of jurisdiction in divorce actions, just as it did in other areas.<sup>27</sup> The Court held, however, that due process had been satisfied by the petitioner's (presumptively bona fide)<sup>28</sup> domiciliary connections to the forum and, as a corollary, that a forum's divorce judgment dissolving the marriage of a forum domiciliary was entitled to full faith and credit in a sister state court.<sup>29</sup>

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<sup>22</sup> This example is taken from the facts in *Williams v. North Carolina*, 317 U.S. 287 (1942) [hereinafter *Williams I*]. Mr. Williams and Mrs. Hendrix, who had been married to a clerk in Williams' store, left North Carolina and traveled to Nevada where they were granted divorces. They then married and returned to live in the same area of North Carolina as their former spouses. North Carolina prosecuted the Williams for bigamous cohabitation. They raised their Nevada divorces in defense to that prosecution. For a detailed discussion of the *Williams I* facts, see Thomas R. Powell, *And Repent At Leisure: An Inquiry into the Unhappy Lot of Those Whom Nevada Hath Joined Together and North Carolina Hath Put Asunder*, 58 HARV. L. REV. 930 (1945).

<sup>23</sup> For a general discussion of migratory divorce see David P. Currie, *Suitcase Divorce in the Conflict of Laws*: Simons, Rosenstiel, and Borax, 34 U. CHI. LAW REV. 26 (1966) (suggesting adoption of federal divorce law).

<sup>24</sup> See generally Powell, *supra* note 22; Currie, *supra* note 23.

<sup>25</sup> In this Article, statements that a state has an "interest" in the marital status of its domiciliaries express the notion that a state has public policy directed toward the maintenance and formation of familial relationships. In contrast, the status label attached to divorce-related litigation reflects the historical concept of a marital "res" that might be located in the domicile of either spouse and the consequent in rem nature of jurisdiction to grant marriage dissolution. See ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* § 221 (3d. ed 1977). After the United States Supreme Court decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), distinctions based on labels such as in rem, quasi-in-rem, or personal jurisdiction seem less appropriate than an analysis based on state interests. Indeed, this focus on state interests is a return to the Supreme Court's language in earlier cases dealing with ex parte divorce (i.e., when only one party appears before the court). See *Williams I*, 317 U.S. at 297-99 (discussing state's interest in the marital status of its domiciliaries).

<sup>26</sup> 317 U.S. 287 (1942).

<sup>27</sup> *Id.* at 296-97, 299, 301; see *Pennoyer v. Neff*, 95 U.S. 714 (1878) (holding money judgment invalid because court lacked personal jurisdiction over defendant).

<sup>28</sup> See *Williams I*, 317 U.S. at 291, 297, 302.

<sup>29</sup> *Id.* at 297, 301. A divorce suit "is not a mere in personam action," *id.* at 297, nor is it strictly

The *Williams I* decision spoke to both due process and full faith and credit requirements. The Court held that the Due Process Clause did not invalidate Nevada's attempt to grant the Williamses a valid divorce. A forum state that was the domicile of the petitioner spouse could constitutionally grant that spouse a divorce from a nonresident respondent<sup>30</sup> if the nonresident had received notice adequate to provide procedural protection.<sup>31</sup> This holding modified the traditional due process requirement for personal causes of action. Jurisdiction to dissolve marriages is set apart from all other types of litigation because it emphasizes the petitioner's forum connections rather than those of the respondent.<sup>32</sup>

The *Williams I* opinion supported the divorce forum's interest in granting a divorce to an individual whose claim to be a forum domiciliary had not been disputed in the divorce proceeding.<sup>33</sup> The Court noted that any forum had a strong interest in the marital status of its domiciliaries.<sup>34</sup> Marital status and the consequent legitimacy or illegitimacy of children could affect not only the morality of the forum's populace but, perhaps more importantly, title to property located within the forum.<sup>35</sup>

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an in rem action.

<sup>30</sup> While only domicile has been recognized as a constitutionally sufficient basis for the grant of an ex parte divorce, commentators generally agree that other adequate reasons include military presence and satisfaction of a substantial residency requirement. See generally RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 5.2G (3d ed. 1986); LEFLAR, *supra* note 25, § 223. Kentucky's residency statute includes military presence as a basis for jurisdiction. KY. REV. STAT. ANN. § 403.140(1)(a) (Michie/Bobbs-Merrill 1984).

<sup>31</sup> Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (holding that method of notice must be reasonably designed to give interested parties notice and opportunity to respond). For a general discussion of Kentucky's notice requirements see GRAHAM & KELLER, *supra* note 4, § T3.04.

<sup>32</sup> Ex parte divorce thus requires no purposeful availing on the part of the respondent spouse, although other claims of personal jurisdiction demand that activity. See *Kulko v. Superior Court*, 436 U.S. 84 (1978) (discussed *infra* notes 98-102 and accompanying text); *Hanson v. Denckla*, 357 U.S. 235, 250-53 (1958) (requiring that defendant have "purposefully availed" himself of the privileges and benefits of the forum state before personal jurisdiction found).

<sup>33</sup> *Williams I*, 317 U.S. at 291, 302. Since the nonresident spouse is not before the court in an ex parte divorce, there is no litigant interested in challenging the court's jurisdiction. In Kentucky, jurisdiction may be established by the testimony of the petitioner spouse, unless challenged by the respondent. See KY. REV. STAT. ANN. § 403.025 (Michie/Bobbs-Merrill 1984 & Supp. 1992).

<sup>34</sup> See *supra* note 25 and accompanying text.

<sup>35</sup> *Williams I*, 317 U.S. at 298. *Williams I* manifested a strong territorial orientation, exhibiting deference to the forum state not only because of the state's need to control morality by controlling behavior within the forum, but also because the chosen rule's impact on forum land title required respect for the forum state's right to grant a divorce. Nevada's interest in granting a divorce to the petitioner claiming to be a domiciliary was closely tied to its interest in the possible implications for Nevada land title. Concern with land title was viewed largely as a local matter, of significant interest only to the state in which the land was located. See *Fall v. Eastin*, 215 U.S. 1 (1909) (refusing to give full faith and credit to decree by court with jurisdiction over both parties that sought to convey out-of-state property); cf. *Clarke v. Clarke*, 178 U.S. 186 (1900) (holding decision of court of testator's

If a man whose move to Nevada represented a change of domicile could not be granted a divorce by that forum, he could not establish legitimate family relationships within the Nevada forum itself.<sup>36</sup> Thus, Nevada's need to protect the moral welfare of its domiciliaries, as well as its interest in title to land located within the state, dictated that North Carolina be required to give full faith and credit to divorces granted to Nevada domiciliaries.

An analysis based on the forum state's interest in the petitioner's status raised problems of respect for the laws of sister states because any advancement of the forum state's policy also served to deter that of the respondent's state.<sup>37</sup> As the Court observed in a later case, also styled *Williams v. North Carolina* ("*Williams II*"), marriage dissolution often meant severing the relationship of two persons whose domiciles were located in different states. If the divorce forum was interested in the petitioner as its purported domiciliary, the state in which the absent respondent continued to live had an equally strong interest in protection of the spouse who remained behind.<sup>38</sup> Although *Williams I* necessarily found that a second forum's interest in the stay-at-home spouse was not sufficient in itself to deny effect to the prior Nevada divorce decree, Nevada's power was based on the court's factual determination that the litigant was indeed a forum domiciliary. Having anchored Nevada's power to grant a valid divorce on the petitioner's domiciliary connection to that state, the Court had also provided a way to limit that power.

A determination of domicile is factual.<sup>39</sup> Although domicile implies a permanent sort of connection between the petitioner seeking a divorce and the forum chosen for the litigation, ex parte divorce petitioners had a not particularly surprising habit of vacating Nevada or similar forums shortly after

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domiciliary state does not bind court of state in which real property is located). In a similar manner, the historical fiction that the marriage was a res located in the domicile of either spouse had territorial roots, but also expressed the significant interest of the domicile in that marital status.

<sup>36</sup> *Williams I*, 317 U.S. at 298-301.

<sup>37</sup> In more recent cases, the Supreme Court has recognized two aspects of federalism: respect for the interests of a coordinate sovereign and respect for the finality of judgments. See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 285 (1980). In the context of ex parte divorce, the problems are related to the first of these federalism concerns. While *Thomas* involved full faith and credit for worker's compensation claims, the federalism issues there are not unrelated to those arising in marriage dissolution. One Supreme Court Justice has compared a state's interest in its worker's compensation laws to its interest in its divorce laws. See *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 446 (1943) (Jackson, J., concurring), *overruled on other grounds*, *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980).

<sup>38</sup> *Williams v. North Carolina*, 325 U.S. 226, 230 (1945) [hereinafter *Williams II*]; see also *Esenwein v. Pennsylvania*, 325 U.S. 279 (1945) (holding Nevada decree created presumption of bona fide Nevada domicile; presumption could be overcome by respondent's presenting competent evidence in Pennsylvania court).

<sup>39</sup> *Williams II*, 325 U.S. at 232; see also *infra* notes 44-52 and accompanying text.

the divorce to return to the state that would not grant them the divorce in the first instance.<sup>40</sup> On appeal from North Carolina's second prosecution of the Williamses, the United States Supreme Court ruled that the Full Faith and Credit Clause<sup>41</sup> did not require the state in which the respondent spouse was domiciled at the time the divorce was granted to accept the divorce forum's finding that the petitioner was a forum domiciliary.<sup>42</sup> *Williams II* gave play to the interests of North Carolina, allowing the court of the divorce respondent's domicile to invalidate the petitioner's divorce decree if it found that the petitioner had not in fact been domiciled in the divorce forum when the marriage dissolution was granted.<sup>43</sup>

Domicile lay at the heart of this jurisdictional scheme because in theory it represented a permanent connection to a territorial base.<sup>44</sup> In an era pre-dating the FAX, the car phone, and frequent flier miles, the individual's relationship to the domicile may have been more enduring. In a modern, mobile society the notion of permanent connections might seem unrealistic.

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<sup>40</sup> See, e.g., *Fink v. Fink*, 346 N.E.2d 415 (Ill. App. 1976) (denying full faith and credit to divorce decree obtained by Illinois resident who returned immediately after Nevada divorce); *Cooper v. Cooper*, 217 N.W.2d 584 (Iowa 1974) (doctor divorced in Nevada returned to Iowa after remarriage; presumption of jurisdiction sustained); *Linck v. Linck*, 288 N.E.2d 347 (Ohio C.P. 1972) (Ohio railroad employee returned to Ohio after Nevada divorce and remarriage but evidence of domiciliary intent sufficient to sustain divorce decree).

<sup>41</sup> U.S. CONST. art. IV, § 1.

<sup>42</sup> The *Williams II* Court demanded due respect for sister state decrees but permitted a second forum to redetermine the jurisdictional fact of domicile. The Court noted with approval the North Carolina trial court's charge to the jury that the Nevada decree's recitation of petitioner's domicile in Nevada was prima facie evidence of that domicile in the North Carolina forum. *Williams II*, 326 U.S. at 235-36. Thus, it permitted the North Carolina fact-finder to determine that the Williamses had been Nevada domiciliaries, but it did not mandate that they do so. The *Williams II* jury had been instructed that the defendants had the burden of proof on the issue of their Nevada domicile. The Court found that this accorded sufficient respect to the Nevada decree. See also *Taylor v. Taylor*, 242 S.W.2d 747, 749 (Ky. 1951) (applying the prima facie evidence rule).

<sup>43</sup> The *Williams II* Court suggested that the standard for determining domicile in such cases was a federal one, based on the national interest in the relationship between states. *Williams I*, 325 U.S. at 231 (1945). See generally WEINTRAUB, *supra* note 30, § 5.2C at 243-44. While a federal standard may be applied in the event of Supreme Court review, a forum normally applies its own domicile rules to determine whether an individual is a forum domiciliary in the first instance. See *Gray v. Roth*, 438 N.W.2d 25, 28-29 (Iowa Ct. App.) (applying Iowa law of domicile to determine that decedent was not an Arkansas domiciliary at the time of his wife's ex parte divorce), *cert. denied*, 493 U.S. 825 (1989).

<sup>44</sup> In Kentucky, the notion of permanent domicile is best illustrated by cases holding that a Kentucky domicile is not lost by a temporary absence. Kentucky courts have treated long absent native-born Kentuckians as domiciliaries, bringing them within the shelter of the temporary absence rule even when the circumstances suggest more than a temporary absence. See *Weintraub v. Murphy*, 244 S.W.2d 454 (Ky. 1951) (more than 20 years' absence); see also *Russell v. Hill*, 256 S.W.2d 508 (Ky. 1953). Occasionally, Kentucky courts have confused the issue of actual residence with domicile. See *Lanham v. Lanham*, 188 S.W.2d 439, 440 (1945) (denying petitioner husband right to Kentucky divorce because he lacked actual residence in Kentucky). The *Lanham* husband was neither an actual resident (having maintained a home and family in Ohio for several years) nor a domiciliary.

Nevertheless, domicile continues to express an important legal connection between an individual and a state, one that carries some connotations of uniqueness, if not permanence.<sup>45</sup> Although every person always has a domicile, he or she has only one domicile at a time.<sup>46</sup> Domicile has been described as an individual's "fixed habitation"<sup>47</sup> or "the home."<sup>48</sup> Courts have said that one's domicile is the "true, fixed, permanent home," the "place [to which] he always intends to return when he is away."<sup>49</sup> While competent adults may elect a domicile,<sup>50</sup> a change of domicile requires a present and fixed intention to make the change, as well as physical presence in the place to which the domicile has been moved.<sup>51</sup> An individual could not be domiciled in a forum state if he had gone to that state for the sole purpose of being granted a divorce without any intent to make it his domicile.<sup>52</sup> Thus, for the *Williams I* Court domicile may have seemed a way to determine the state with the strongest policy concerns related to the issue of an individual's marital status. Moreover, domicile has the observable, objective characteristic of physical presence within a state. If a petitioner immigrated to a state and became a permanent resident, that state clearly had a strong interest in his or her marital status. Marriage dissolution rules initially emphasized the new state's strong interest, ignoring the interest of the state in which the spouse was left behind.

Although domicile had this objective aspect, it also possessed characteristics that made its determination less than certain. Domicile depends not only on physical presence but also on intent.<sup>53</sup> If the divorce petitioner intended

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<sup>45</sup> The degree of permanence required has changed over time. See *Rzeszotarski v. Rzeszotarski*, 296 A.2d 431, 435 (D.C. 1972) (citing *Jones v. Jones*, 136 A.2d 580, 582 (D.C. 1957), which contrasts the English requirement of "'fixed intent to remain here permanently'" with the American test of "'absence of any intention to go elsewhere'"). Compare *White v. Tennant*, 8 S.E. 596, 597 (W. Va. 1888) (applying historical rule that domiciliary must intend to remain for an indefinite period of time) with RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18 (1971) (domiciliary must intend to make state his domicile "for the time at least").

<sup>46</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 11 (1971).

<sup>47</sup> *In re Marriage of Kimura*, 471 N.W.2d 869, 877 (Iowa 1991).

<sup>48</sup> See *Scoggins v. Scoggins*, 555 A.2d 1314, 1322 n.15 (Pa. Super. 1989) (quoting a 1925 address by Justice Cardozo to the American Law Institute).

<sup>49</sup> *Person v. Person*, 563 N.E.2d 161, 164 (Ind. Ct. App. 1990).

<sup>50</sup> See generally WEINTRAUB, *supra* note 30, § 2.2-9.

<sup>51</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 15(2), 18 (1971).

<sup>52</sup> Normally, states do not examine motive. See WEINTRAUB, *supra* note 30, at § 17. However, some states apply a rule requiring that the divorce petitioner acquire a bona fide or good faith domicile in the state. See *In re Marriage of Kimura*, 471 N.W.2d 869, 877 (Iowa 1991); cf. *Linck v. Linck*, 288 N.E.2d 347, 349 (Ohio C.P. 1972) (mere fact that a party left forum state and went to another state for the express purpose of procuring a divorce does not require that forum refuse recognition of foreign divorce decree, provided that the party "intended to make the foreign state his residence or domicile").

<sup>53</sup> *McGowan v. McGowan*, 663 S.W.2d 219, 222-23 (Ky. App. 1983); see also *Person v. Person*,

to remain for an indefinite period of time, he was a divorce forum domiciliary, but if he had no real intention to remain and only wanted a divorce, he was not.<sup>54</sup> Once a party who had claimed to be a Nevada domiciliary returned to the state in which his former spouse remained domiciled, he raised questions about his intent at the time of the divorce. If he was not a Nevada domiciliary when he was granted the divorce, then he never changed his domicile from North Carolina.<sup>55</sup> A system theoretically grounded on the domiciliary attachment to a state could not then deny that a state in the position of North Carolina had a significant interest in the parties' marital status.

## 2. *The Incidents of Marriage*

A second area of conflicting state interests arose out of those cases concerning not merely dissolution of the marital status, but the rights arising from the marriage. As with adjudication of marital status, the problem was raised by migratory divorce. In *Estin v. Estin*,<sup>56</sup> the United States Supreme Court distinguished the incidents of marriage from the marital status itself, creating a jurisdictional rule that looked not to a state's interest in its domiciliary petitioner, but to the respondent spouse's connection to the forum state. The Court held that the Full Faith and Credit Clause did not require New York to enforce a Nevada divorce decree that made no provision for post-dissolution support of a New York wife who had rights to separate maintenance under a prior New York decree.<sup>57</sup> The *Estin* Court created the concept of divisible divorce, which treated property rights arising from marriage differently from the marital status itself. While marital status might be dissolved based on a petitioner's connection with the forum, property rights could not be adjudicated unless the forum court had personal jurisdiction over the respondent spouse.<sup>58</sup> In *Vanderbilt v. Vanderbilt*,<sup>59</sup> the Court extended the divisible

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563 N.E.2d 161 (Ind. Ct. App. 1990) (wife who returned to Illinois to effect reconciliation lost Indiana domicile because she intended to move back to Indiana only if reconciliation unsuccessful); *Kimura*, 471 N.W.2d at 877-78 (Japanese physician husband's acquisition of green card and tenure track position at an Iowa university showed bona fide intent to claim domicile).

<sup>54</sup> See, e.g., *Linck v. Linck*, 288 N.E.2d 347, 349 (Ohio C.P. 1972) (stating the general rule).

<sup>55</sup> See *supra* notes 39-43 and accompanying text.

<sup>56</sup> 334 U.S. 541 (1948).

<sup>57</sup> *Id.* at 549.

<sup>58</sup> *Id.*

<sup>59</sup> 354 U.S. 416 (1957). Kentucky courts have applied the *Estin-Vanderbilt* rules on the few occasions raising the issue. See, e.g., *Murphy v. Murphy*, 464 S.W.2d 231 (Ky. 1970); *Pollard v. Pollard*, 330 S.W.2d 407 (Ky. 1959); *Davis v. Davis*, 303 S.W.2d 256 (Ky. 1957).

divorce rule to instances in which the respondent spouse's support rights had not been set by a prior decree.<sup>60</sup>

The *Williams-Vanderbilt* cases outlined a system of controls on divorce jurisdiction derived from the Due Process<sup>61</sup> and Full Faith and Credit<sup>62</sup> Clauses. Marriage dissolution depended on the petitioner's domicile; the respondent's forum connections were irrelevant.<sup>63</sup> Adjudication of property rights, such as establishment of the right to alimony,<sup>64</sup> followed more traditional rules of personal jurisdiction and focused on the respondent's connections to the forum.<sup>65</sup> Although rules related to status adjudication and those on the incidents of marriage are both articulated in terms of judicial jurisdiction,<sup>66</sup> they represent two different problems. One of those problems is related to modern due process concerns, the other to issues associated with full faith and credit. Due process limitations on judicial and legislative jurisdiction typically protect a defendant from the unfair surprise of litigating her case in a forum with which she has insufficient connections.<sup>67</sup> In contrast, full faith and credit

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<sup>60</sup> *Vanderbilt*, 354 U.S. at 418-19.

<sup>61</sup> U.S. CONST. amend. XIV, § 1.

<sup>62</sup> U.S. CONST. art. IV, § 1.

<sup>63</sup> *Williams v. North Carolina*, 317 U.S. 287 (1942).

<sup>64</sup> At the time the *Williams* cases were decided, the concept of marital property that is now widespread had not been proposed or adopted by any state. Kentucky adopted the Uniform Marriage and Divorce Act in 1972, including its property division provisions. See KY. REV. STAT. ANN. §§ 403.010, .110-.350 (Miche/Bobbs-Merrill 1984 & Supp. 1992); UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 147 (1973). Before the adoption of that Act, the right to alimony was the only significant economic right arising from the marriage. See also CLARK, *supra* note 16, § 15.1 (noting that alimony is less important because of change in women's social status).

<sup>65</sup> *Vanderbilt*, 354 U.S. 416 (1957); *Estin v. Estin*, 334 U.S. 541 (1948). An exception to the requirement that the forum have personal jurisdiction over the absent spouse to affect property-related issues arose in *Simons v. Miami Beach First Nat'l Bank*, 381 U.S. 81 (1965). The Supreme Court held that Florida's ex parte divorce might cut off inchoate dower rights in Florida real property: "The inchoate right of dower is a creature of the law, born of the marriage altar and finds its sepulchre in divorce." *Id.* at 85-86 n.6. As in *Williams I*, the *Simons* outcome is related to a state's interest in protection of title to real property located within the state. Unlike *Williams I*, however, the *Simons* case probably involves a false conflict. See *infra* notes 70-82 and accompanying text.

<sup>66</sup> Thus, a forum is said to have jurisdiction to dissolve a marriage if the petitioner spouse is a forum state domiciliary, *Williams v. North Carolina*, 317 U.S. 287, 291 (1942), but to lack jurisdiction over the respondent spouse for purposes of a support determination. *Vanderbilt*, 354 U.S. at 418-19; *Estin*, 34 U.S. at 549; see also *Smith v. Smith*, 459 N.W.2d 785 (N.D. 1990). Other commentators have noted the necessary relationship between the reach of a state's jurisdiction to adjudicate and its ability to apply its own law as the rule of decision. See WEINTRAUB, *supra* note 30, § 4.2.

<sup>67</sup> Although some early Supreme Court cases proceeded on a full faith and credit analysis, *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932), modern constitutional controls on choice of law have been found primarily in the Due Process Clause. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). For an argument that full faith and credit should play a stronger role in choice of law see Peter Hay, *Full Faith and Credit and*

limitations implicate problems of appropriate respect between sister states.<sup>68</sup> The status cases, those in which the validity of an ex parte divorce is determined, are generally said to be exceptions to the minimum contacts requirement of personal jurisdiction.<sup>69</sup> However, the status exception might also be seen as a rule grounded in choice of law principles.

The absence of a choice of law function in most divorce cases may obscure the relationship of the *Williams* cases to general conflict of laws rules. In most types of litigation, a forum must examine choice of law issues separately from the question of personal jurisdiction. The general rule in divorce, that a forum applies its own law, reduces these two inquiries to a single question. Although ex parte divorce cases do not confront the choice of law directly, it is implicit in the decisions.

Viewed in relationship to choice of law, the two *Williams* cases illustrate either a true conflict or a false conflict, depending on whether the petitioner spouse is actually domiciled in the first forum.<sup>70</sup> The *Williams I* rule<sup>71</sup> proceeds from the notion that the forum state has a significant interest in the status of the domiciliary petitioner because it is the place in which the domiciliary is most likely to remarry and form another family.<sup>72</sup> If the petitioner is indeed a divorce forum domiciliary, the forum state's interest in his status will lead to the application of forum law to determine his right to divorce, notwithstanding the other state's interest, because most forums faced with a true conflict will apply forum law.<sup>73</sup> If the divorce petitioner is not a bona fide domiciliary, however, the state in which the absent respondent resided and in which the petitioner was probably domiciled at the time of divorce<sup>74</sup> has the most significant interest in marital status. Moreover, the

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*Federalism in Choice of Law*, 34 MERCER L. REV. 709 (1983).

<sup>68</sup> See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 285 (1980); see also *supra* note 37 and accompanying text.

<sup>69</sup> See, e.g., *In re Marriage of Kimura*, 471 N.W.2d 869, 875 (Iowa 1991). For a case acknowledging that the basis of the status exception is a fictional, intangible res that terminated with the marriage, see *Carr v. Carr*, 385 N.E.2d 1234, 1235-36 (N.Y. 1978).

<sup>70</sup> The concept of false conflicts, in which only one state has a policy at stake, and true conflicts, in which both states whose laws may be applied to resolve the dispute have interests at stake, was first developed by Brainerd Currie. See generally BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); see also WEINTRAUB, *supra* note 30, §§ 3.6, 6.1.

<sup>71</sup> See *supra* notes 25-36 and accompanying text.

<sup>72</sup> *Williams v. North Carolina*, 317 U.S. 287, 298-301 (1942). Modern choice of law doctrine recognizes the difference between conduct-regulating rules and rules of loss allocation. A forum state may have an interest in the application of its conduct-regulating rules when it would not have an interest in the application of rules of loss allocation. See *Shultz v. Boy Scouts Of America, Inc.*, 480 N.E.2d 679, 684-85 (N.Y. 1985).

<sup>73</sup> See, e.g., *Arnett v. Thompson*, 433 S.W.2d 109 (Ky. 1968) (applying Kentucky's rule on interspousal immunity although Ohio, where spouses were domiciled, had a possible interest).

<sup>74</sup> If the party who claimed to be a domiciliary in the first forum made a false claim and did not intend to change his or her domicile, he or she would have retained the domicile of origin. See *In*



case may be a false conflict: a forum in the position of Nevada in the *Williams* cases has no interest in the marital status of a nondomiciliary who does not reside in the state. Thus, the status exception to the requirement that a defendant have minimum contacts with a forum is not related to surprise and fairness concerns,<sup>75</sup> but to the interests of states in regulating matters within either their territorial limits or their general jurisdiction.

Consideration of the status exception in relation to the choice of law rule rather than solely as a rule of personal jurisdiction better explains why fairness to the absent defendant can be achieved even when he or she has no contact with the forum. Moreover, linking status and choice of law would explain the *Williams II* loophole, which allows the second forum to reexamine the jurisdictional issue of domicile,<sup>76</sup> as the outcome of a true conflict that the Full Faith and Credit Clause is unable to regulate.<sup>77</sup>

Divisible divorce has a strong relationship to choice of law in addition to its recognized jurisdictional characteristics. Both the forum that granted the divorce and the domicile of the respondent have interests at stake. While the divorce forum has the strongest interest in the marital

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*re Person v. Person*, 563 N.E.2d 161, 164 (Ind. App. 1991) ("A self-serving statement of intent is not sufficient to establish that a new domicile has been acquired."); *Linck v. Linck*, 288 N.E.2d 347, 349 (Ohio. C.P. 1972) (finding return and remarriage contradicted claim of Nevada domicile).

<sup>75</sup> See *In re Marriage of Kramer*, 589 N.E.2d 951, 953 (Ill. App. Ct. 1992) (citing *Boyer v. Boyer*, 383 N.E.2d 223, 225 (Ill. App. Ct. 1978) for the proposition that restrictions on state jurisdiction are "more than a guarantee of immunity from inconvenience" and acknowledging that "they are a consequence of territorial limitation on the power of respective states."). The absence of surprise and fairness concerns does not mean that a respondent spouse domiciled in North Carolina has no complaints about the use of a Nevada forum and Nevada's more lenient divorce law to dissolve her marriage. It may mean, however, that Nevada's interest in domiciliaries other than the petitioner permits it to give greater weight to the need for a valid marriage dissolution. As a practical matter, the North Carolina spouse probably surmises the end of the relationship, although she does not know which forum with more lenient divorce laws her spouse may choose.

<sup>76</sup> See *supra* notes 42-43 and accompanying text.

<sup>77</sup> If both states have a legitimate interest, the Full Faith and Credit Clause does not provide a mechanism for subordinating the interest of one state to that of the other. In the area of worker's compensation, this has resulted in a rule allowing the application of either the law of the state of injury or the state of employment. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935). Only in those instances in which a forum state has no viable interest in the litigation has either the Full Faith and Credit Clause, *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 161-62 (1932) (finding Vermont's worker's compensation law a valid defense to wrongful death action brought in sister state that lacked meaningful relation to cause of action), or the Due Process Clause, *Home Ins. Co. v. Dick*, 281 U.S. 397, 407 (1930) (holding Texas court violated due process by depriving party of property in absence of minimum contacts with Texas), barred the forum state's application of its laws. Though both cases involved constitutional controls on choice of law in areas other than divorce, the principles that they represent apply to ex parte divorce where the lack of a choice of law function means that jurisdictional rules also serve as the choice of law rules.

status of its domiciliary, it has no legitimate interest in allowing that obligor entirely to escape support duties arising from a prior marriage. The divisible divorce cases are thus like false conflicts.<sup>78</sup> They emphasize fairness to the defendant over state interest in marital status because no state has a legitimate interest in entirely depriving a former spouse of support when doing so will produce an unwarranted windfall to a local obligor. Of course, the very fact that *Estin*<sup>79</sup> and *Vanderbilt*<sup>80</sup> had to be decided in the Supreme Court indicates that states do not necessarily see the false conflict.<sup>81</sup> Therefore, the cases may express the national interest in proper respect for sister state concerns that emanates from the Full Faith and Credit Clause.<sup>82</sup>

### 3. *Emergence of Long-Arm Statutes as a Solution to Divisible Divorce*

In theory, divisible divorce prevented a party who was granted a Nevada divorce from cutting off the support rights of a spouse who remained behind in North Carolina. If, however, the Nevada divorce petitioner remained in that state and did not return to North Carolina, the promise of divisible divorce was rather empty. The Nevada petitioner was unlikely to seek to set more than the most minimal support in the Nevada divorce, if support received any mention at all. The North Carolina spouse now had no jurisdictional avenue through which to pursue her former spouse in Nevada for support. The Nevada spouse's change of domicile had deprived the North Carolina spouse of the right to use North Carolina's general jurisdiction over its domiciliaries as the jurisdictional basis for her support claim.<sup>83</sup>

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<sup>78</sup> Divisible divorce might also be explained on a more modern conflicts basis, such as comparative impairment. See *Bernhard v. Harrah's Club*, 546 P.2d 719, 721-24 (Cal.) (finding that California's interest in recovery for injured motorist would have been inappropriately impaired by application of Nevada's protective dram shop act to defendant who actively solicited California business), *cert. denied*, 429 U.S. 859 (1976). Certainly the obligor seeking an ex parte divorce has no reason to be surprised that the state in which he has left a spouse or children to whom he owes a support duty continues to expect him to fulfill that duty.

<sup>79</sup> *Estin v. Estin*, 34 U.S. 541 (1948).

<sup>80</sup> *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1967).

<sup>81</sup> See *supra* notes 56-66 and accompanying text.

<sup>82</sup> See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932). See generally WEINTRAUB, *supra* note 30, at 550. Explaining the divisible divorce cases as false conflicts does not address an important issue relevant to current problems in child support enforcement. Even if a state has no legitimate interest in serving as a safe haven for obligors avoiding support duties, it may have an interest in protecting the support rights of the obligor's subsequent family living within the state. In the future, that problem may lie at the heart of attempts to provide national systems of child support enforcement. See *infra* notes 260-77 and accompanying text.

<sup>83</sup> See *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (noting the reciprocal rights and duties arising from domicile).

Two developments mitigated the difficulties of the spouse who remained in the original domicile. First, most states began to develop grounds for divorce that made emigration to another state unnecessary.<sup>84</sup> Second, states began to assert personal jurisdiction over former domiciliaries on the basis of specific activity within the forum. Unlike the general jurisdiction asserted over a domiciliary,<sup>85</sup> this specific jurisdiction depended on particular affiliating circumstances.<sup>86</sup> The most common of these arose when the former domiciliary had "maintained a marital domicile" or lived within the state while married.<sup>87</sup> As a New Jersey court pointed out in *Egbert v. Egbert*,<sup>88</sup> maintenance of a marital domicile within the state has as many economic consequences as the commercial activity on which jurisdiction is often based.<sup>89</sup> With the adoption of long-arm statutes related to marital domicile, states in which former spouses were left behind regained much of what had been lost through the application of rules upholding the right to migratory divorce. While the migrating spouse might get a divorce in a foreign forum, that forum could neither relieve him of support obligations nor effect a division of property that would bind the absent spouse. The state of matrimonial domicile, in contrast, could exercise specifically affiliating

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<sup>84</sup> See generally CLARK, *supra* note 16, at 405-12 (discussing development and adoption of no-fault divorce in many states). California developed the first no-fault divorce law, *see id.*, and Kentucky followed approximately 12 years later, in 1972. See KY. REV. STAT. ANN. § 403.170 (Michie/Bobbs-Merrill 1984).

<sup>85</sup> General jurisdiction relies on an affiliation with a forum that makes it reasonable to assert personal jurisdiction over a defendant in any cause of action even if the defendant is not served within the forum. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 415-19 (1984) (delineating current differences between general and specific jurisdiction). For a complete explanation of the difference between general jurisdiction and specific jurisdiction, see Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1135-63 (1966).

<sup>86</sup> One commentator has said that former domicile is a specifically affiliating connection to a state. See WEINTRAUB, *supra* note 30, § 4.11, at 152 (citing among other cases *Defazio v. Wright*, 229 F. Supp. 111 (D.N.J. 1964) (relying on specifically affiliating circumstances of boat collision) and *Schneider v. Linkfield*, 209 N.W.2d 225 (Mich. 1973) (basing jurisdiction on "statute covering actions arising out of 'ownership of personal property situated within the [forum]'"").

<sup>87</sup> See, e.g., ILL. REV. STAT. ANN. ch. 110, para. 2-209(a)(5) (Smith-Hurd Supp. 1990) (allowing jurisdiction based on maintenance of marital domicile or commission in state of an act giving rise to cause of action); N.C. GEN. STAT. 1-75.4(12) (1967) (any action arising out of the maintenance of a marital relationship in the state if the other party continues to reside in the state); N.Y. CIV. PRAC. L. & R. 302(b) (McKinney 1974) (maintenance of marital domicile within state); *see also* Linda D. Henry, *Domestic Relations: The Role of Long-arm Statutes*, 10 WASHBURN L.J. 487 (1970); Comment, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 COLUM. L. REV. 289 (1973). See generally James O. Pearson, Jr., Annotation, *Long-Arm Statutes: Obtaining Jurisdiction over Nonresident Parent in Filiation or Support Proceedings*, 76 A.L.R.3d 708 (1977).

<sup>88</sup> 309 A.2d 746 (N.J. Super. Ct. Ch. Div. 1973).

<sup>89</sup> *Id.* at 748.

jurisdiction under its long-arm statute. Unless its resident had consented to an entry of appearance in a foreign divorce court,<sup>90</sup> only the state of matrimonial domicile could render a binding adjudication on both property and support.<sup>91</sup>

By the end of the 1970s, state divorce jurisdiction schemes protected two important state interests. First, by imposing significant residency requirements,<sup>92</sup> a state could carry out its policy of granting divorces to actual domiciliaries, thereby maintaining the integrity of state divorce decrees.<sup>93</sup> The longer an individual was required to remain in a state before filing for divorce, the more certain the state could be of the petitioner's candor in asserting his intention to remain in that state on a permanent basis. Substantial residency requirements assured the divorce forum state that it had not granted a divorce that could be rendered invalid under the *Williams II* rule.<sup>94</sup> At the same time, long-arm statutes protected the right of domiciliaries to rely on their states' divorce rules.<sup>95</sup> A long-arm statute focusing on the defendant's specific activity within the forum enabled the forum domiciliary to achieve a complete resolution of marital disputes with a spouse who had left the state of marital domicile.<sup>96</sup>

### *B. Personal Jurisdiction and Child Support Obligations*

The historical basis of the *Williams-Vanderbilt* rules provides an important source of information for evaluating modern attempts to expand personal jurisdiction, particularly in the context of child support. Like the

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<sup>90</sup> Consent and appearance in a foreign divorce proceeding precludes a party from attacking the divorce collaterally. *Sherrer v. Sherrer*, 334 U.S. 343 (1948). Those in privity with the consenting party are similarly precluded. *Johnson v. Muelberger*, 340 U.S. 581 (1951).

<sup>91</sup> See *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418-19 (1957); *Estin v. Estin*, 334 U.S. 541, 549 (1948); *supra* notes 56-69 and accompanying text.

<sup>92</sup> See *supra* note 21 and accompanying text.

<sup>93</sup> A state's interest in granting divorces only to actual domiciliaries rested on its interest in protecting forum judgments from collateral attack in a sister state. See *Sosna v. Iowa*, 419 U.S. 393, 407 (1975).

<sup>94</sup> See *supra* notes 38-47 and accompanying text.

<sup>95</sup> See, e.g., statutes cited *supra* note 87.

<sup>96</sup> Residency requirements combined with long-arm statutes to create a window in which the state of the former marital domicile was the *only* state that could resolve all issues related to the marriage dissolution. Until the migratory spouse had satisfied the new forum's residency requirement, the stay-behind spouse could file for divorce and seek resolution of all issues in the former marital domicile. If the required period of residence in the migratory spouse's new state was longer than any period of separation demanded by the former domicile, the former domicile was the only state that could grant a valid divorce. In any case, it remained the only state that could address property and support issues.

initial ex parte divorce cases, child support cases are complicated because states have adopted different rules related to standards of support and multiple obligees, particularly second families.<sup>97</sup> Interest analysis may help determine those cases in which expanded jurisdiction affects important interests of the states in which both support obligors and support recipients reside.

Constitutional requirements for the imposition of child support obligations demand personal jurisdiction over both the recipient and the obligor. In *Kulko v. Superior Court*,<sup>98</sup> the Supreme Court held that California lacked personal jurisdiction over a New York father whose former spouse sought to modify support.<sup>99</sup> The father's connections to the state of California were his marriage to the children's mother in that state while he was on three-day leave from the military and the presence of their children in the state.<sup>100</sup> The Court held that none of the father's activity, whether it involved mere acquiescence to the children's moves to California or actual assistance in moving them, rose to the level of "purposeful[ly] availing" himself of the laws of the state necessary to satisfy due process and thus to subject him to California's jurisdiction for purposes of child support modification.<sup>101</sup>

The mere presence of a child in a forum state has not necessarily been a sufficient ground for that state to claim personal jurisdiction over a nonresident obligor.<sup>102</sup> Instead, states have looked at the obligor's specific connections with the forum other than the child's presence there. Some states have emphasized the tortious nature of a parent's failure to provide support for a child as a specifically affiliating connection to the forum in which the child lives.<sup>103</sup> Failure to pay for a child's support harms the child located in the state. In addition, the obligor may be seen as purposefully availing himself of state benefits because the state often provides for the child when the obligor does not. One problem with the tort theory is that an obligor may have little or no control over the child's presence in the forum. Mere acquiescence to the child's presence in the forum is not a purposeful

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<sup>97</sup> See *infra* notes 267-79 and accompanying text.

<sup>98</sup> 436 U.S. 84 (1978).

<sup>99</sup> *Id.* at 96.

<sup>100</sup> *Id.* at 86-88. One of the *Kulko* children left the father's New York residence without his permission; however, the father, who was the child's custodial parent at the time of her departure, did not institute an action for her return. The father later assisted a second child in moving to California to live with his mother.

<sup>101</sup> *Id.* at 94.

<sup>102</sup> *Id.*

<sup>103</sup> See, e.g., *Lozinski v. Lozinski*, 408 S.E.2d 310 (1991). But see *In re Marriage of Kramer*, 589 N.E.2d 951, 954 (Ill. App. Ct. 1992) (holding that tortious nonsupport within scope of statute does not confer jurisdiction without minimum contacts). At least one case has held that a parent's promise to provide a child with a college education and his subsequent failure to do so caused an effect in the state in which the child resided. *Johnson v. Bradbury*, 558 A.2d 61 (N.J. Super. 1989).

availing.<sup>104</sup> As an alternative to the tort theory, some states have found jurisdiction in concepts related to the execution of a contract within the state.<sup>105</sup>

An emerging theory uses the maintenance of a parent-child relationship in the state to support the assertion of personal jurisdiction over a nonresident child support obligor.<sup>106</sup> The concept is somewhat similar to other purposeful availing arguments, although it is unlike the establishment of a marital domicile because the location in which the availing occurs is less likely to be the joint choice of the adults involved. Nevertheless, a parent who enters a state for the purpose of maintaining a relationship with a child may take advantage of that state's benefits. For example, a parent who visits with a child in the child's state of residence relies on that state's rules to provide access to the child, whether or not that state entered the order of visitation. The parent benefits not merely from the recognition of the visitation order, but from other state rules, such as those that give parents access to children's school records or medical records.<sup>107</sup>

### C. *Kentucky's Previous Rules Related to Long-Arm Jurisdiction*

Kentucky's divorce jurisdiction scheme failed to mirror traditional rules in two ways. Not only did the state's general long-arm statute lack specific sections related to divorce, but another state statute<sup>108</sup> impaired any claim of personal jurisdiction over a former resident who was not personally served within Kentucky or served pursuant to the long-arm statute.<sup>109</sup> Although the state had adequately protected its interest in granting divorces only to domiciliaries through the imposition of a 180-day residency requirement,<sup>110</sup>

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<sup>104</sup> *Kulko*, 436 U.S. at 94.

<sup>105</sup> For examples in which consent to personal jurisdiction has been inferred from the execution of a separation agreement providing for child support, see *Massey v. Ball*, 595 A.2d 390 (Del. Sup. 1991) (finding that husband who submitted separation agreement regarding child support obligations for incorporation into divorce decree thereby consented to jurisdiction); *Taylor v. Head*, 594 A.2d 115 (Md. App. 1991) (stating that execution of separation agreement in North Carolina gave North Carolina jurisdiction over nonresident father).

<sup>106</sup> See *Phillips v. Phillips*, 826 S.W.2d 746, 748-49 (Tex. Ct. App. 1992).

<sup>107</sup> Parents who enter a state in which they do not reside in order to visit children also run the risk of being personally served within the state for purposes of child support modification. See *Burnham v. Superior Court*, 495 U.S. 604 (1990). When personal jurisdiction is based on the parent's physical presence, no minimum contacts analysis is necessary. Cf. *Kulko*, 436 U.S. at 94.

<sup>108</sup> "No personal judgment shall be rendered against a defendant constructively summoned, and who has not appeared in the action, except as provided in K.R.S. 454.210." KY. REV. STAT. ANN. § 454.165 (Michie/Bobbs-Merrill 1985).

<sup>109</sup> For an excellent discussion of Kentucky's long-arm scheme, see John R. Leathers, *Rethinking Jurisdiction and Notice in Kentucky*, 71 Ky. L.J. 755 (1982-83).

<sup>110</sup> KY. REV. STAT. ANN. § 403.140(a) (Michie/Bobbs-Merrill 1984).

it failed to defend the interests of Kentucky spouses whose husbands or wives departed the state before filing and service in a divorce action.

The absence of a comprehensive long-arm statute directed to marriage dissolution never prevented petitioners who could satisfy the residency requirement from seeking a divorce. If Alex, a former domiciliary of New Mexico, moved to Kentucky and resided within the state for 180 days, he might sue Barbara, his wife, for a divorce even though Barbara continued to reside in New Mexico and had so little connection with the state of Kentucky that she could not locate it on a map.<sup>111</sup> The absence of divorce-related provisions in the general long-arm statute, when combined with Kentucky Revised Statutes section 454.165,<sup>112</sup> had an entirely different result. If Alex and Barbara were lifelong Kentucky residents and a childless married couple,<sup>113</sup> Alex's departure from Kentucky and his acquisition of a new domicile in New Mexico would have deprived a Kentucky court of any jurisdiction to award maintenance to Barbara. Arguably, the absence of the long-arm statute would also have deprived the Kentucky court of the right to divide the couple's personalty.<sup>114</sup>

A party in Barbara's position might have argued that Kentucky could assert personal jurisdiction over Alex if he owned real property in Kentucky. The statute that provided support for this argument<sup>115</sup> would have been effective to assist Barbara's claim for equitable distribution even if title to the property were in Alex's name alone, as long as the property could be classified as marital.<sup>116</sup> However, the statute would not have provided

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<sup>111</sup> *Williams v. North Carolina*, 317 U.S. 287, 316 (1942) (Jackson, J., dissenting) (complaining that the *Williams* decision permitted a forum to grant a divorce in an instance in which it could not hear a "suit to collect a grocery bill").

<sup>112</sup> See *supra* note 108.

<sup>113</sup> If a married couple had children and the spouse remaining in Kentucky could prove that the obligor absented himself or herself to avoid child support obligations, Kentucky courts would have been able to claim long-arm jurisdiction. KY. REV. STAT. ANN. § 454.275 (Michie/Bobbs-Merrill 1985).

<sup>114</sup> But see *Gaines v. Gaines*, 566 S.W.2d 814, 819 (Ky. Ct. App. 1978) (finding authority for disposition of personal property located within state).

<sup>115</sup> Jurisdiction is based on

[h]aving an interest in, using, or possessing real property in this Commonwealth, providing the claim arises from the interest in, use of, or possession of the real property, provided, however, that such in personam jurisdiction shall not be imposed on a resident who did not himself voluntarily institute the relationship, and did not knowingly perform, or fail to perform, the act or acts upon which jurisdiction is predicated.

KY. REV. STAT. ANN. § 454.210(a)(6) (Michie/Bobbs-Merrill 1985).

<sup>116</sup> Kentucky classifies marital property broadly: "All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of coownership." *Id.* § 403.190 (Michie/Bobbs-Merrill 1984 and Supp. 1992). Other states have recognized property ownership as a factor in determining personal jurisdiction for divorce. See, e.g., *Williams v. Williams*, 433 A.2d 1316, 1319 (N.H. 1981); *Hann v. Hann*, 421 A.2d 607, 609-10 (N.J. Super. Ct. Ch. Div. 1980)

personal jurisdiction over Alex if Barbara sought only a maintenance award.<sup>117</sup> The statute's language limits its reach to matters arising from the property itself as a specifically affiliating connection.<sup>118</sup> This limitation also has a constitutional basis: in *Shaffer v. Heitner*,<sup>119</sup> the United States Supreme Court barred states from using the presence of property in the forum to substitute for contacts with an absent respondent. As in the Kentucky statute, property could serve as a basis for personal jurisdiction only if the claim "arose from" the property.<sup>120</sup> The Court suggested that claims arise from property only when they are directly related to the property's ownership.<sup>121</sup> When this principle is applied in the context of divorce, claims arise from real property only if one of the spouses has a legitimate ownership right. However, the effect of this restriction is mitigated by Kentucky's definition of marital property.<sup>122</sup> If Alex and Barbara acquired a horse farm during their marriage, even if title were in Alex's name alone, Barbara would have an ownership claim at the time of divorce because the property was acquired during the marriage. Ownership claims in divorce depend on the classification of marital property rather than on title.<sup>123</sup> Barbara would have a right to establish her ownership of a share of the property's value based on equitable distribution rules.<sup>124</sup>

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(basing jurisdiction analysis in part on ownership of property in state). Despite the apparent constitutional restraints imposed by *Shaffer v. Heitner*, 433 U.S. 186, 213 (1977), property ownership has been found to constitute sufficient basis for jurisdiction in divorce. *Bechtold v. Bechtold*, 588 So. 2d 321 (Fla. Dist. Ct. 1991) (finding wife's ownership of property in state sufficient for personal jurisdiction).

<sup>117</sup> In Kentucky, the award of a share of marital property may affect the grant or denial of maintenance. *Newman v. Newman*, 597 S.W.2d 137, 138 (Ky. 1980) (finding criterion for establishing amount of maintenance award is lack of marital property sufficient to provide for spouse's reasonable needs). The award of maintenance is determined by balancing the needs of a claimant with the obligor's ability to satisfy those needs. See KY. REV. STAT. ANN. § 403.200 (Michie/Bobbs-Merrill 1984). Although the Kentucky maintenance statute is drafted in terms of easing the transition from marriage to single status, the award may be payable for longer periods of time in cases involving long-term marriages. See *Atwood v. Atwood*, 643 S.W.2d 263 (Ky. Ct. App. 1982); *Combs v. Combs*, 622 S.W.2d 679 (Ky. Ct. App. 1981); *Frost v. Frost*, 581 S.W.2d 582 (Ky. Ct. App. 1979).

<sup>118</sup> The claim must "arise[ ] from the interest in, use of, or possession of the real property." KY. REV. STAT. ANN. § 454.210(a)(6) (Michie/Bobbs-Merrill 1985).

<sup>119</sup> 433 U.S. 186, 213 (1977).

<sup>120</sup> *Id.* For a discussion of the difference between claims arising from property and other claims related to support, see John R. Leathers, *Forum Juridicum: The First Two Years After Shaffer v. Heitner*, 40 LA. L. REV. 907, 913-17 (1980).

<sup>121</sup> *Shaffer*, 433 U.S. at 208.

<sup>122</sup> All property acquired during the marriage is marital property. KY. REV. STAT. ANN. § 403.190 (Michie/Bobbs-Merrill 1984 and Supp. 1992); see *supra* note 116.

<sup>123</sup> See *supra* note 116 and accompanying text. The spouse claiming that property is nonmarital bears the burden of establishing its nonmarital character. KY. REV. STAT. ANN. § 403.190(3) (Michie/Bobbs-Merrill 1984); see *Brunson v. Brunson*, 569 S.W.2d 173, 176 (Ky. Ct. App. 1978) (preventing court from assigning property to spouse who failed to trace it to premarital assets).

<sup>124</sup> Barbara would be entitled to a "just and right" division of marital property after consideration



No similar long-arm statute covered disputes related to personal property. In spite of a Kentucky decision indicating that the presence of personal property within the state might permit its division,<sup>125</sup> the United States Supreme Court opinion in *Shaffer v. Heitner*<sup>126</sup> prevents a state court that grants an ex parte divorce<sup>127</sup> from awarding personal property on the basis of its physical location in the state.<sup>128</sup> While the *Shaffer* Court noted traditional exceptions related to status adjudications,<sup>129</sup> those exceptions should not apply to property division or other incidents of marriage.<sup>130</sup>

Kentucky also limited its ability to claim jurisdiction over nonresident child support obligors. Courts had specific statutory authority to claim personal jurisdiction over an obligor who maintained a marital domicile in this state and who left the state to avoid the payment of those obligations.<sup>131</sup> Some other states found the abandonment theory sufficiently akin to tort concepts that had long supported long-arm jurisdiction<sup>132</sup> and relied on that notion to expand support for jurisdictional claims.<sup>133</sup> In contrast, the

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of statutory factors such as each spouse's contribution to the acquisition of property, including the contribution of a spouse as homemaker. KY. REV. STAT. ANN. § 403.190(1) (Michie/Bobbs-Merrill 1984 and Supp. 1992).

<sup>125</sup> *Gaines v. Gaines*, 566 S.W.2d 814, 818 (Ky. Ct. App. 1978).

<sup>126</sup> 433 U.S. 186 (1977).

<sup>127</sup> Most courts agree that *Shaffer* does not affect a forum's ability to grant an ex parte divorce. See *In re Marriage of Kimura*, 471 N.W.2d 869, 875 (Iowa 1991); *Carr v. Carr*, 385 N.E.2d 1234, 1236 (N.Y. 1978); *Carroll v. Carroll*, 363 S.E.2d 872, 874 (N.C. Ct. App. 1988).

<sup>128</sup> *Shaffer* would disable a Kentucky court even when Kentucky was the former marital domicile. While the absent respondent has sufficient minimum contacts with Kentucky to permit the assertion of personal jurisdiction, *Shaffer* implicitly demands that the state claim jurisdiction over the person, rather than substitute property's presence for that claim. See *Leathers*, *supra* note 120, at 914-16.

<sup>129</sup> *Shaffer*, 433 U.S. at 208 n.30.

<sup>130</sup> Many Kentucky spouses whose husbands or wives have left the state have probably exercised self-help equitable distribution by dividing joint bank accounts, since both parties have rights of withdrawal. See KY. REV. STAT. ANN. § 391.305 (Michie/Bobbs-Merrill 1984) (providing that determination of beneficial ownership between joint account holders has no bearing on their ability to withdraw funds). Self-help with regard to personal effects probably involves merely keeping what is left behind by the absent spouse. However, some important personal effects, such as stock shares or bank accounts held only in the name of one spouse, cannot be reached without a court order.

<sup>131</sup> *Id.* § 454.275 (Michie/Bobbs-Merrill 1985); see *supra* note 113.

<sup>132</sup> *Cf. supra* notes 103-04 and accompanying text (noting attempts to find tortious conduct in failing to provide child support).

<sup>133</sup> See, e.g., *Jones v. Chandler*, 592 So. 2d 966, 971-73 (Miss. 1991) (finding that despite absence of paternity provision from state's long-arm statute, act of begetting a child within the state provided jurisdiction by sounding in tort); *Hostetler v. Kennedy*, 590 N.E.2d 793, 795 (Ohio Ct. App. 1990) (holding failure to pay court-ordered child support a tortious act of omission); *accord Lozinski v. Lozinski*, 408 S.E.2d 310 (W. Va. 1991). But see *Duncan v. Duncan*, 419 N.E.2d 700, 701 (Ill. App. 1981) (finding failure to pay child support does not in itself give personal jurisdiction under tort section of long-arm statute); *accord Morrill v. Tong*, 453 N.E.2d 1221 (Mass. 1983); *Moore v. McFarland*, 466 N.W.2d 309, 310 (Mich. App. 1990); *Runnels v. Firestone*, 746 S.W.2d 845 (Tex. Ct. App. 1988) (failure to provide support for dependent adult child inadequate jurisdictional basis under either tort or contract portion of Texas long-arm statute then in effect).

Kentucky statute restricted the reach of the state courts by requiring a Kentucky marital domicile.<sup>134</sup>

If Kentucky parties were never married, the custodial parent was even more likely to face significant problems in collecting child support from a nonresident respondent.<sup>135</sup> Although the long-arm statute had a section directly addressed to paternity,<sup>136</sup> that section only permitted Kentucky to base paternity on the respondent's sexual activity within the state. In two kinds of cases, that statute provided no grounds for the assertion of long-arm jurisdiction. First, jurisdiction could not be claimed when the child had been conceived outside Kentucky. Second, no jurisdiction existed when paternity had been established but a support obligation was missing or inadequate under Kentucky's rules.

## II. PROVIDING FOR LONG-ARM JURISDICTION IN FAMILY LITIGATION: KENTUCKY REVISED STATUTES SECTION 454.220

Kentucky Revised Statutes section 454.220<sup>137</sup> contains at least three types of requirements: (1) those that establish the proceedings to which the statute applies; (2) those that determine the parties covered by the statute; and (3) those that specify the claims that must be made by the party attempting to trigger the statute's use.<sup>138</sup>

The statute applies to both divorce actions and district court actions for the establishment and enforcement of child support obligations outside marriage.<sup>139</sup> It clearly applies in divorce cases because of language related

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<sup>134</sup> Jurisdiction was restricted to "a person whose marital domicile is in Kentucky." KY. REV. STAT. ANN. § 454.275 (Michie/Bobbs-Merrill 1985).

<sup>135</sup> See *supra* note 12 (availability of URESA provided a remedy that may have been less than efficient).

<sup>136</sup> See KY. REV. STAT. ANN. § 454.210(2)(a)(8) (Michie/Bobbs-Merrill 1985 and Supp. 1992).

<sup>137</sup> Personal jurisdiction of courts over nonresidents in certain domestic matters.—A court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards, or special relief in matrimonial actions may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time the demand is made, if this state was the matrimonial domicile of the parties before their separation; the defendant abandoned the plaintiff in this state; or the claim for support, alimony, maintenance, distributive awards, or special relief in matrimonial actions accrued under the laws of this state. The action shall be filed within one (1) year of the date the respondent or defendant became a nonresident of, or moved his domicile from, this state. Service of process may be made by personal service if the defendant or respondent is found within the state or by service through the use of KRS 454.210(3).

*Id.* § 454.220 (Michie/Bobbs-Merrill Supp. 1992).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

to maintenance, distributive awards, or special relief in matrimonial actions, and also because one of the statutory grounds for long-arm jurisdiction is the former maintenance of marital domicile in the state.<sup>140</sup>

The statute's application to support claims for children whose parents have never been married can be determined by a close reading of the types of claims, as well as the types of proceedings, enumerated in the statutory language.<sup>141</sup> The statute first states that it covers "proceeding[s] involving a demand for support, alimony, maintenance, distributive awards, or special relief in matrimonial actions."<sup>142</sup> At first glance, the phrase "in matrimonial actions" might seem to modify all the claims listed, but later statutory language indicates that this reading is incorrect. The statute covers two classes of petitioners: parties seeking support who are residents or domiciled in Kentucky at the time the demand for support is made, and parties for whom Kentucky was the marital domicile before separation.<sup>143</sup> If the statute were directed only to divorce, there would be no apparent need to specify both classes of potential petitioners. Former marital domicile alone would permit a Kentucky court to assert long-arm jurisdiction over any appropriate nonresident spouse for the purpose of determining whether a Kentucky resident petitioner had a right to post-dissolution support.<sup>144</sup> Since the statute also covers demands for support of persons domiciled in Kentucky, it must be intended to cover some support cases that are not related to divorce. The covered cases necessarily involve child support because Kentucky law does not provide support for unmarried domestic partners.<sup>145</sup>

The drafters of the statute lumped together two classes of defendants who might be hailed into court under the statute: former residents and former domiciliaries. The two classes of defendants have a common characteristic—absence from the state when litigation commences—but their former connections to the state may differ. Domicile and residence are legally distinct concepts.<sup>146</sup> As every conflicts student knows, domicile is based on both

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* A source of confusion may be the reference to family courts in the statute. There are family court pilot projects in Louisville and Shelbyville. Perhaps the reference to family courts in the statute envisions expansion of these pilot projects to other areas. The reference should not be taken to mean that district courts may not use the long-arm statute. A district court has jurisdiction over paternity actions and in that context operates as a family court. *See id.* § 407.170 (Michie/Bobbs-Merrill 1984).

<sup>142</sup> *Id.* § 454.220 (Michie/Bobbs-Merrill Supp. 1992).

<sup>143</sup> *Id.*

<sup>144</sup> *See id.* (providing long-arm jurisdiction based on former maintenance of a marital domicile within the state).

<sup>145</sup> *See Glidewell v. Glidewell*, 790 S.W.2d 925 (Ky. Ct. App. 1990); *Murphy v. Bowen*, 756 S.W.2d 149 (Ky. Ct. App. 1988).

<sup>146</sup> *See supra* notes 44-52 and accompanying text. While individuals have only one domicile, they

physical presence and intention to remain for an indefinite period of time.<sup>147</sup> Every person has a domicile, but he or she may not have more than one domicile at a time.<sup>148</sup> Domicile thus implies a unique and perhaps pervasive connection with a state. In the case of most competent adults, that connection is based on the choice of the person claiming the domicile. Residence is not as well defined. Residence probably means more than a transient connection with the state, but connotes a less stable connection than domicile.<sup>149</sup> In spite of the statute's equal treatment of the two terms, there may be some important differences between former domiciliaries and former residents.

The statute's classification scheme also contains requirements related to the characteristics of both petitioners and respondents. The following table may be helpful to characterize the parties covered by the statute:

**Potential Parties Under Kentucky  
Revised Statutes § 454.220<sup>150</sup>**

<i>Petitioner</i>	<i>Respondents</i>	
Resident/domiciliary seeking support	Former domiciliary	Former resident
Party whose marital domicile before separation was Kentucky	Former domiciliary	Questionable whether applicable to former resident
Party abandoned in Kentucky by defendant	Former domiciliary	Former resident
Petitioner whose claim accrued under Kentucky law	Former domiciliary	Former resident

This table suggests the myriad combinations of petitioners and respondents possible under the statute. For example, in the first column of the chart there

may have more than one residence. *See, e.g.,* Snelling v. Gardner, 590 N.E.2d 330, 333 (Ohio Ct. App. 1990).

<sup>147</sup> *See, e.g.,* St. John v. St. John, 163 S.W.2d 820, 822-23 (Ky. 1942); McGowan v. McGowan, 663 S.W.2d 219, 222-23 (Ky. Ct. App. 1983).

<sup>148</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11, at 47 (1969).

<sup>149</sup> *See* Snelling, 590 N.E.2d at 333.

<sup>150</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992); *see supra* note 137.

are four possible types of claims: (1) a Kentucky resident seeking support from a former domiciliary of Kentucky; (2) a domiciliary of Kentucky seeking support against a former domiciliary of Kentucky; (3) a Kentucky resident seeking support against a former resident; and (4) a Kentucky domiciliary seeking support against a former resident.

The path through the statute is convoluted. Some of the statute's applications, however, are clear and fall well within the range of constitutionally permissible state court activity. The statute does not lack significant, legitimate application just because it is somewhat difficult to read. It raises interesting questions that involve charting the boundaries between well-established applications of the statute, less established but possibly permissible applications, and those applications for which there is no current constitutionally permissible basis.

### III. APPLYING MINIMUM CONTACTS ANALYSIS TO THE NEW STATUTE

#### A. *Former Marital Domicile*

The least troublesome portion of Kentucky's long-arm statute<sup>151</sup> relates to the former maintenance of a marital domicile within Kentucky. Prior maintenance of a marital domicile in a state is a widely accepted basis for claiming personal jurisdiction over a nonresident respondent in a divorce action.<sup>152</sup> Maintenance of a marital domicile satisfies the

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<sup>151</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992); see *supra* note 137.

<sup>152</sup> See, e.g., FLA. STAT. ANN. § 48.193(1)(e) (West Supp. 1989) (using marital domicile); IDAHO CODE § 5-514(e) (1990) (maintaining a "marital domicile at the time of the commission of any act giving rise to a cause of action for divorce"); ILL. ANN. STAT. ch. 110, para. 2-209(a)(5) (Smith-Hurd 1992) (maintenance of a marital domicile in state at time cause of action arose or when act committed giving rise to cause of action); KAN. STAT. ANN. § 60-308(b)(8) (1983) (living in marital relationship in state regardless of subsequent departure); LA. REV. STAT. ANN. § 13.3201(A)(6) (West 1991) (long-arm jurisdiction based on "nonsupport of a child, parent, or spouse or a former spouse domiciled in this state to whom an obligation of support is owed and with whom the nonresident formerly resided in this state"); MASS. ANN. LAWS ch. 223A, § 3(g) (Lawyers Co-op 1986) (state was marital domicile for one year before action commenced and plaintiff's current residence); N.Y. CIV. PRAC. L. & R. 3-302(b) (McKinney Supp. 1993) (party seeking support is resident when demand made and state was parties' matrimonial domicile before separation); N.C. GEN. STAT. § 1-75.4(12) (1992) (action arising from marital relationship in state regardless of actor's departure if other party still resides in state); OKLA. STAT. ANN. tit. 12, § 1701.3(7) (West 1990) (maintaining any relationship to persons or property within the state, including support for minor children); TEX. FAM. CODE ANN. § 3.26(1) (West 1993) (state may exercise personal jurisdiction over nonresident spouse if forum was last marital domicile and suit is brought within two years after marital residence ended); WIS. STAT. ANN. § 801.05(11) (West Supp. 1992) (residing in state in marital relationship with plaintiff for not less than six consecutive months within the six years preceding action); see also *Prybolsky v. Prybolsky*, 430 A.2d 804, 807 (Del. Fam. Ct. 1981) (last marital domicile); *Durand v. Durand*, 569 So. 2d 838 (Fla. Dist. Ct. App. 1990) (husband's move to Virginia did not deprive Florida of personal jurisdiction over him when wife and children continued to reside in state); *Arthur*

due process requirements of minimum contacts and purposeful availing.<sup>153</sup>

The Kentucky long-arm provision<sup>154</sup> does not define marital domicile. Other courts have said that marital domicile is the last homeplace that the parties shared.<sup>155</sup> It is sometimes difficult to determine whether courts exercising long-arm jurisdiction are emphasizing the act of living as a married person within a state or the respondent's connections as a former domiciliary. The emphasis may change in relation to specific statutory language. For example, in *In re Marriage of Brown*,<sup>156</sup> a Kansas court ignored a military husband's claim that he could not be subject to personal jurisdiction in a Kansas divorce court because his retention of his Mississippi home of record meant that he had never been a Kansas domiciliary. The Kansas long-arm statute required only "living in a marital relationship within the state."<sup>157</sup> In contrast, a Florida court in *Lefkovitz v. Lefkovitz*<sup>158</sup> denied full faith and credit to an Illinois divorce judgment because the Illinois statute required marital domicile at the time the cause of action arose.<sup>159</sup> The court found that the respondent husband had not been an Illinois domiciliary when the divorce action was filed because he had already moved his domicile to Florida.<sup>160</sup>

Use of marital domicile language in Kentucky's long-arm statute raises at least two issues. The first is whether both spouses must be Kentucky domiciliaries in order to have a marital domicile within the state. Suppose, for example, that both spouses live in Kentucky long enough to satisfy the state's 180-day residency requirement for divorce,<sup>161</sup> then one spouse leaves the

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v. Arthur, 543 So. 2d 349, 351 (Fla. Dist. Ct. App. 1989) (jurisdiction based on former marital domicile not lost when husband moved to New York); Straus v. Straus, 393 S.E.2d 248, 250 (Ga. 1990) (minimum contacts of wife who moved from state included last marital domicile in state); Mizner v. Mizner, 439 P.2d 679, 682 (Nev.) (jurisdiction found when husband's conduct during joint residence in state gave rise to cause of action), *cert. denied*, 393 U.S. 847 (1968); Dillon v. Dillon, 176 N.W.2d 362, 364 (Wis. 1970) (defendant husband had lived in state for at least six months during the preceding six years; jurisdiction existed if wife also satisfied statutory requirements). *But see* CONN. GEN. STAT. ANN. § 446-46(b) (West 1986) (requiring that both parties be domiciliaries immediately prior to or at time when divorce action filed).

<sup>153</sup> See *supra* notes 98-107 and accompanying text.

<sup>154</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992).

<sup>155</sup> See, e.g., *Lefkovitz v. Lefkovitz*, 341 So. 2d 253, 257 (Fla. Dist. Ct. App. 1976).

<sup>156</sup> 795 P.2d 375, 379-82 (Kan. 1990). Although living in a marital relationship within a state is a constitutionally sufficient basis, marrying in a state is not. See *Kulko v. Superior Court*, 436 U.S. 84, 86-87 (1978); *Jenkins v. Jenkins*, 556 So. 2d 441, 443 (Fla. Dist. Ct. App. 1990).

<sup>157</sup> *Brown*, 795 P.2d at 380 (citing KAN. STAT. ANN. § 60-308(b)(8) (1983)).

<sup>158</sup> 341 So. 2d 253 (Fla. Dist. Ct. 1976).

<sup>159</sup> *Id.* at 254.

<sup>160</sup> Mr. Lefkovitz's decision not to return to Illinois, the "act giving rise to Ms. Lefkovitz's divorce action," came after his permanent move to Florida. *Id.*

<sup>161</sup> KY. REV. STAT. ANN. § 403.140 (Michie/Bobbs-Merrill 1984).

state. The remaining spouse wishes to sue for divorce and to have all the parties' rights adjudicated in Kentucky. As a petitioner, that spouse may argue that her extended presence in the state establishes Kentucky as her domicile and therefore as the parties' marital domicile. The respondent spouse, however, might argue that although he lived within the state for more than 180 days, he was not a Kentucky domiciliary because he lacked the requisite intent.<sup>162</sup> In this case, the petitioner's dilemma arises from the statutory language itself rather than from constitutional constraints. Maintaining a marital relationship in a state is a constitutionally sufficient basis for the assertion of long-arm jurisdiction.<sup>163</sup> It is the Kentucky statute that requires marital domicile.<sup>164</sup> As in other parts of the statute, domicile should be judged by the acts of the parties as well as their expressed intention.

Another issue is whether a party may claim a marital domicile in Kentucky before satisfying the state's divorce residency requirements.<sup>165</sup> Suppose, for example, that a few weeks after their move to Kentucky, one of the spouses was again transferred to another state. If that spouse's absence is not temporary<sup>166</sup> and the

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<sup>162</sup> To avoid this problem, a petitioner claiming marital domicile in the state should plead facts other than the extended period of residence in the state. See *Scoggins v. Scoggins*, 555 A.2d 1314, 1323 (Pa. Super. Ct. 1988) (requiring that pleading contain facts beyond bare assertion of domicile). Since both parties' testimony may be self-serving, a court may need objective evidence of domiciliary intent. See *McGowan v. McGowan*, 663 S.W.2d 219, 222-23 (Ky. Ct. App. 1983) (allowing personal jurisdiction where facts indicated Kentucky domicile although residency requirement was not met).

<sup>163</sup> See *In re Marriage of Brown*, 795 P.2d 375, 381 (Kan. 1990).

<sup>164</sup> See KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992). Interpretation of any long-arm statute requires a two-pronged test. First, the long-arm statute must provide a basis for the claim of personal jurisdiction. Second, that basis must meet constitutional due process demands. See *Impola v. Impola*, 464 N.W.2d 296, 299 (Minn. Ct. App. 1990); *In re S.A.V.*, 798 S.W.2d 293, 299 (Tex. Ct. App. 1990). The Kentucky petitioner's problem arises from the first step. The simplest way out of the petitioner's dilemma is the use of an alternative statutory provision. Kentucky courts might avoid the language related to marital domicile by emphasizing the defendant-oriented requirements of Kentucky Revised Statutes § 454.220: the defendant is subject to personal jurisdiction if she is a former resident regardless of her domiciliary status. Another possible resolution would be to permit the extended residence within the state to create a presumption of domicile to be rebutted by the respondent spouse.

<sup>165</sup> Domicile may be established in a period far shorter than the 180 days necessary to file for divorce in Kentucky under KY. REV. STAT. ANN. § 403.140 (Michie/Bobbs-Merrill 1984). An individual who comes to Kentucky with an intent to remain for an indefinite period of time becomes a Kentucky resident when he enters the state because domicile requires only physical presence plus that intent. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1971).

<sup>166</sup> Under existing Kentucky law, temporary absence would not destroy domiciliary intent. See *McGowan v. McGowan*, 663 S.W.2d 219, 222-23 (Ky. Ct. App. 1983); see also *Powers v. Pansher*, 409 S.E.2d 725 (N.C. App. 1991) (father's move to New Mexico did not destroy relationship between

state to which she is transferred has a very short residency requirement, it is probable that the departing spouse will be able to file for divorce in her new state of residence before an action can be commenced by the spouse remaining in Kentucky. To file for divorce, the Kentucky spouse would be required to satisfy the residency requirements; they are not abrogated by the long-arm statute. On the other hand, the long-arm statute gives the Kentucky spouse one year after the departing spouse changes his domicile or residence in which to file a support action,<sup>167</sup> so the spouse remaining in Kentucky should be able to satisfy the residency requirement and to file in one year.

A party claiming long-arm jurisdiction over an absent respondent must bring the action within one year from the date on which the nonresident moves his or her domicile from the state.<sup>168</sup> This provision limits the statutory language requiring that the marital domicile have been maintained in this state "before" the parties' separation.<sup>169</sup> Nevertheless, the statute does not insist that Kentucky must be the "last marital domicile of the parties."<sup>170</sup> Cases may arise in which a party files for divorce and claims long-arm jurisdiction over an absent spouse after a period during which both parties have been absent from the state. In those cases, Kentucky courts should use a two-part procedure to determine the extent of their jurisdiction. First, the court should characterize the petitioner's absence from the state. If she was a temporarily absent domiciliary, she could file for divorce immediately upon her return. However, if she changed her domicile, she would be required to fulfill the 180-day residency requirement before filing for divorce.<sup>171</sup> Second, if the court determines that the petitioner remains a domiciliary, it should

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marriage and North Carolina).

<sup>167</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992).

<sup>168</sup> *Id.*

<sup>169</sup> Courts in other states have imposed a requirement that a marital domicile have been maintained in the state within a reasonable period before the action was filed. *See* Popple v. Popple, 355 S.E.2d 657, 658 (Ga. 1987) (marital domicile maintained 20 years before action; no personal jurisdiction); Marbury v. Marbury, 352 S.E.2d 564, 565-66 (Ga. 1987) (husband who married in state and resided there briefly with wife 14 years before divorce filed was not subject to personal jurisdiction); Lieb v. Lieb, 385 N.Y.S.2d 569, 574 (N.Y. App. Div. 1976) (marital domicile maintained 13 years before action; no personal jurisdiction); *cf.* Fralix v. Cordle, 403 S.E.2d 793 (Ga. 1991) (two-year absence from state during which wife filed *garnishment* action did not preclude personal jurisdiction).

<sup>170</sup> *Cf.* Nickerson v. Nickerson, 542 P.2d 1131 (Ariz. Ct. App. 1975) (requiring that state be most recent marital domicile).

<sup>171</sup> *See* KY. REV. STAT. ANN. § 403.140 (Michie/Bobbs-Merrill 1984); Person v. Person, 563 N.E.2d 161 (Ind. Ct. App. 1991) (finding intent to remain indicative of changed domicile although action commenced after one week's residence); McGowan v. McGowan, 663 S.W.2d 219, 222-23 (Ky. Ct. App. 1983).



consider whether the now-absent respondent maintained a marital domicile in the state within the required one-year period.<sup>172</sup> If Kentucky courts adopted this test, they would assume jurisdiction to decide all matters related to divorce when Kentucky was the parties' last marital domicile and the respondent spouse had not been absent from the jurisdiction for more than one year, but they would not assert jurisdiction in most cases if there were an intervening domicile.

This interpretation rests on consideration of the long-arm statute in conjunction with the statutory residency requirement. To illustrate: if a court finds that the petitioner spouse did not change domiciles, the court may permit the petitioner to file for a divorce upon returning to the state without actually satisfying the residency requirement.<sup>173</sup> In that case, Kentucky is the couple's last marital domicile even if the nonresident spouse changed his domicile to another state. Moreover, Kentucky Revised Statutes section 454.220 covers the respondent as a former domiciliary. The respondent's absence for less than one year is not sufficient to destroy the minimum contacts necessary to establish personal jurisdiction.<sup>174</sup> If the Kentucky court finds that the petitioner spouse in fact changed domiciles and must therefore fulfill the residency requirement,<sup>175</sup> the waiting period involved in the residency requirement is likely to prevent Kentucky from serving as a forum without regard to the issue of last marital domicile.<sup>176</sup> The 180-day residency requirement will disable any spouse absent from the jurisdiction for more than six months because she will not be able to establish residence before the one-year

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<sup>172</sup> See KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992).

<sup>173</sup> *McGowan*, 663 S.W.2d at 222-23.

<sup>174</sup> See *Arthur v. Arthur*, 543 So. 2d 349 (Fla. Dist. Ct. App. 1989) (allowing jurisdiction over defendant who maintained home in state one year before action filed).

<sup>175</sup> KY. REV. STAT. ANN. § 403.140 (Michie/Bobbs-Merrill 1984). For an example of such a spouse, see *Person*, 563 N.E.2d 161.

<sup>176</sup> In considering all of the possible combinations under the statute, it is important to remember that a respondent who does not move his domicile from Kentucky may be subject to the state's general jurisdiction even though he is a nonresident. *Millikan v. Meyer*, 311 U.S. 457, 463 (1940) (holding domicile within state gives that state sufficient basis for extraterritorial service). See *Beasley v. Beasley*, 396 S.E.2d 222 (Ga. 1990), in which the Georgia court held that it had personal jurisdiction over a husband residing in Saudi Arabia who obtained his first divorce in Georgia, married the resident petitioner in that state, and resided there, when testimony established that the defendant husband had always intended to return to Georgia. The first two factors cited by the *Beasley* court are make-weights because the husband's intention to return meant that he was not domiciled in Saudi Arabia, but in Georgia. If a petitioner relies on the domiciliary connection of a nonresident spouse, the claim of personal jurisdiction is not based on service under the long-arm statute. In consequence, KY. REV. STAT. ANN. § 454.165 (Michie/Bobbs-Merrill 1985), which forbids personal judgment against a constructively summoned defendant, may limit this state's ability to render a personal judgment against the nonresident defendant who cannot be served in the state.

statutory limitation period runs.<sup>177</sup> It is the residency requirement rather than the long-arm statute that causes this outcome. Under this test there may be a few cases in which Kentucky is not the parties' last marital domicile but the petitioner spouse can meet the residency requirement. In such cases the long-arm statute permits the state to assert personal jurisdiction over the absent spouse.<sup>178</sup> In Kentucky, such cases will necessarily involve a petitioner spouse who changes domicile and then returns to Kentucky with domiciliary intent within a period of six months. In those cases, Kentucky courts may wish to consider other factors related to the assertion of jurisdiction.<sup>179</sup>

### *B. Abandonment in the State of Kentucky*

A separate clause of the new long-arm statute provides that a respondent who abandons the petitioner in the state of Kentucky may be subject to long-arm jurisdiction for the purpose of determining claims related to property division, maintenance, or child support.<sup>180</sup> The adoption of abandonment as a predicate for long-arm jurisdiction relies heavily on the notion that committing a tort in a state is an acceptable basis for long-arm jurisdiction.<sup>181</sup> Although long-arm jurisdiction based on the commission of a single tortious act is so well accepted that it hardly bears discussion, it does not necessarily follow that abandonment of family members raises the same types of legal issues as having a motor vehicle accident on Kentucky highways. While the abandonment section of the statute meets both minimum contacts and purposeful availing requirements,<sup>182</sup> it may be difficult to apply.

In the first instance, it is far more simple to determine that Alex drove his automobile on Kentucky highways than it is to determine that Alex abandoned Barbara and their minor child Charles in Kentucky. A finding of abandonment may require that the court find both that the abandoning spouse's activity caused the abandoned spouse's Kentucky

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<sup>177</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992).

<sup>178</sup> Courts in some other states have declined jurisdiction on the basis that the parties' last marital domicile had a more significant relationship to the marriage. See, e.g., *Corcoran v. Corcoran*, 353 So. 2d 805, 809 (Ala. Civ. App. 1978) (denying Alabama jurisdiction when parties had been domiciled in North Carolina for four years).

<sup>179</sup> See *Brislawn v. Brislawn*, 443 So. 2d 32, 34 (Ala. 1983) (Alabama court asserted personal jurisdiction over nonresident husband because Alabama was the only place in the United States where the parties had resided as husband and wife), *cert. denied*, 464 U.S. 1040 (1984).

<sup>180</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992).

<sup>181</sup> See *id.* § 454.210(2)(a)(3) (allowing personal jurisdiction where claim arises from "causing tortious injury by an act or omission in this Commonwealth").

<sup>182</sup> See *supra* notes 98-107 and accompanying text.

presence<sup>183</sup> and that the activity of the abandoning spouse was intentional.<sup>184</sup> Several scenarios might raise interpretive problems on both issues. For example, suppose that Alex and Barbara leave Kentucky and move to Indiana. After they have resided in Indiana for ten months, Barbara returns to Kentucky and sues Alex for child support. If Barbara's own choice controlled the move to Kentucky, it might be difficult to argue that Alex abandoned her in this state.<sup>185</sup> Treating Barbara as a legally independent person capable of choosing her own domicile<sup>186</sup> might mean that no act of Alex's is an unequivocal cause of her presence in the state. An even narrower view of causation might demand that a finding of abandonment be based on Barbara's presence in the state prior to any act by Alex. In other words, Alex could be found to have abandoned Barbara in Kentucky only if they were both in Kentucky and he left the state to avoid the payment of child support or other familial obligations.<sup>187</sup> Causation might, of course, turn out to be a more flexible concept. If Alex threw Barbara out of their Indiana home and she returned to her Kentucky family, we might say that Alex "caused" Barbara's Kentucky presence.<sup>188</sup> But what of the case in which Alex moves to Indiana to take a new job and Barbara, unhappy away from her family, returns to Kentucky and sues Alex for child support on the ground that he abandoned her here?<sup>189</sup>

This latter hypothetical illustrates not only the factual difficulty underlying abandonment determinations, but also their close relationship to the determination of fault. A court faced with Alex, who needs to leave the state to find employment, and Barbara, who cannot be happy away from her close-knit family, might be influenced by fault-related concepts in determining

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<sup>183</sup> Causation, like domicile, may be a slippery factual issue. See *Landis v. Kolsky*, 409 A.2d 276, 280 (N.J. 1979) (finding that wife chose to move to California; husband not subject to personal jurisdiction in that state).

<sup>184</sup> See, e.g., *Hines v. Clendinning*, 465 P.2d 460, 463 (Okla. 1970) (court implied that husband sent wife home to Oklahoma).

<sup>185</sup> See *Landis*, 409 A.2d at 280.

<sup>186</sup> Even under traditional rules treating wives as derivative domiciliaries whose choice was dependent on their husband's intent, wives were permitted to choose their own domiciles at divorce. See generally WEINTRAUB, *supra* note 30, § 2.6.

<sup>187</sup> Reading KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992) in this manner does not make the abandonment clause of the statute redundant in relation to KY. REV. STAT. ANN. § 454.275 (Michie/Bobbs-Merrill 1985). The latter statute permits assertion of long-arm jurisdiction only on the basis of the avoidance of child support obligations, whereas section 454.220's abandonment clause gives rise to a similar claim with respect to spousal support.

<sup>188</sup> See *Hines*, 465 P.2d at 463.

<sup>189</sup> See *Meadows v. Meadows*, 596 N.E.2d 1146, 1149 (Ohio Ct. App. 1992) (finding that wife moved children to Ohio of her own volition). An important difference between the hypothetical case and *Meadows* is that Richard Meadows had no prior contacts with Ohio. Alex, in contrast, must have been either a Kentucky resident or a Kentucky domiciliary.

whether Barbara was abandoned. If Alex is not providing any support for Barbara and Charles, a court might skip the niceties of statutory predicates and find that because the act of failing to provide support was intentional, it could serve as the basis for a finding of abandonment. The case is more difficult if Alex provides some support, but not as much as Barbara would like. To determine that Alex has abandoned Barbara, the court must find that Barbara's decision to stay seems more reasonable than Alex's decision to go elsewhere in pursuit of his career.

The abandonment section adds very little to the statute. If Alex and Barbara are married, Barbara might claim long-arm jurisdiction over Alex under the marital domicile section of the statute.<sup>190</sup> If they are not married, she would qualify under the first section of the statute as a party seeking support who is a resident of the state. The real importance of the statutory section on abandonment may lie in its overbreadth. It may provide a fallback when the presence of the support seeker in Kentucky cannot justify jurisdiction over the absent spouse under existing constitutional doctrine.

### C. *Claim Accruing Under Kentucky Law*

The long-arm statute provides that a former domiciliary or resident may be sued in a Kentucky forum if the petitioner's claim accrued under Kentucky law.<sup>191</sup> This section, unlike the other three,<sup>192</sup> does not require the petitioner to be a Kentucky resident or domiciliary. The respondent spouse's presence and acquisition of personal or real property in the state would satisfy the constitutional minimum contacts and purposeful availing requirements.<sup>193</sup> It is the respondent's activity of acquisition in the state, however, not the property's presence here, that counts.<sup>194</sup> Similarly, when the petitioner's claim is for support, it is the respondent's act of failing to provide support, not the debt itself, that is the jurisdictional basis.<sup>195</sup>

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<sup>190</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992); see *supra* notes 44-52 and accompanying text.

<sup>191</sup> Personal jurisdiction is authorized if "the claim for support, alimony, maintenance, distributive awards, or special relief in matrimonial actions accrued under the laws of this state." KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992).

<sup>192</sup> See *supra* notes 151-90; *infra* notes 205-25 and accompanying text.

<sup>193</sup> Compare the "doing business" section of the general long-arm statute, KY. REV. STAT. ANN. § 454.210(2)(a)(1) (Michie/Bobbs-Merrill Supp. 1992).

<sup>194</sup> See *Shaffer v. Heitner*, 433 U.S. 186, 213-17 (1977) (holding stockholders in Delaware corporation not subject to personal jurisdiction there absent other ties to the state).

<sup>195</sup> *Id.*

This statutory section may lead to an alteration of the rule of *McCormick v. McCormick*<sup>196</sup> that a former domiciliary may not be sued in Kentucky if neither the respondent nor the petitioner has lived in the state for a period of more than six months.<sup>197</sup> A nonresident petitioner<sup>198</sup> might sue a child support obligor in Kentucky for child support obligations that accrued while the obligor was a Kentucky domiciliary<sup>199</sup> or resident and could file at any time within one year after the respondent changed his or her domicile or residence to another state.<sup>200</sup>

While the statutory section covering claims accruing under Kentucky law may have this expansive effect in child support cases, its application in other situations is more difficult to hypothesize. Nevertheless, there may be some cases made possible by this section that would otherwise not be subject to Kentucky jurisdiction. Some parties may be able to claim jurisdiction under this portion of the statute although Kentucky was never the marital domicile,<sup>201</sup> they do not reside in the state, and the respondent has left the state. Suppose, for example, that Alex and Barbara separated in Ohio and Alex moved to Kentucky.<sup>202</sup> The parties lived apart for some time before Alex left Kentucky. Within one year after Alex left Kentucky, Barbara procured an ex parte divorce in Ohio. She then sought to compel Alex to litigate all remaining divorce issues by using the long-arm statute and claiming that he had been a Kentucky domiciliary or resident within the preceding year.<sup>203</sup> Barbara's claim would rest on the proposition that property Alex acquired while he lived in Kentucky would have been marital property under this state's laws.<sup>204</sup> Her claim to those assets, therefore, accrued under Kentucky law and gave rise to long-arm jurisdiction.

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<sup>196</sup> 623 S.W.2d 909 (Ky. 1981) (analogizing the jurisdictional requirements for child custody, Ky. REV. STAT. ANN. § 403.420 (Michie/Bobbs-Merrill 1984), to those for child support).

<sup>197</sup> *Id.* at 910.

<sup>198</sup> For an argument that a long-arm statute requiring that the petitioner be a forum domiciliary violates the privileges and immunities clause, see *Westcott v. Westcott*, 551 N.E.2d 1202, 1203 (Mass. 1990).

<sup>199</sup> If the respondent is a Kentucky domiciliary, he may be sued in this state even if he is not physically present. See *Millikan v. Meyer*, 311 U.S. 457, 462 (1940).

<sup>200</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992); see *supra* notes 167-72 and accompanying text.

<sup>201</sup> See *supra* notes 44-52 and accompanying text.

<sup>202</sup> Since the parties never lived together in Kentucky, it could not be their marital domicile.

<sup>203</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992).

<sup>204</sup> In Kentucky, property acquired by either spouse's efforts during the marriage is marital property. KY. REV. STAT. ANN. § 403.190(2), (3) (Michie/Bobbs-Merrill Supp. 1992). Physical separation does not toll the acquisition of marital property. See *Stallings v. Stallings*, 606 S.W.2d 163, 164 (Ky. 1980).

*D. Party Seeking Support is a Kentucky Resident at the Time the Demand for Support is Made*

The most expansive section of the statute, and therefore the most interesting, provides for long-arm jurisdiction when the party seeking support is a Kentucky resident "at the time the demand [for support] is made."<sup>205</sup> This section raises both interpretive questions and significant constitutional issues.

The statute speaks to "support" claims, but must have been intended to apply primarily to child support. The statute requires that "the party seeking support" be a Kentucky resident or domiciliary.<sup>206</sup> The quoted language is not defined within the statute. Child support claims may be brought by the child's custodial parent, a custodian or guardian who is not a parent, or the state in seeking reimbursement for Aid to Families with Dependent Children ("AFDC") payments.<sup>207</sup> In each case, the parent or custodian might be considered "the party seeking support" even though the support is sought on the child's behalf. In most cases both the parent or custodian and the child will be Kentucky residents, so there will be no need to determine which of these parties is the required Kentucky resident.<sup>208</sup> There may, however, be a few instances in which the parent seeking support resides in Kentucky, but the child resides outside the state. One possible example is the custodial parent who seeks support for a child residing in an out-of-state institution or attending an out-of-state school.<sup>209</sup> Also, cases might arise in which the parent seeking support is the nonresident, but the child is in a Kentucky institution. To cover both cases, Kentucky courts would have to read the statutory language as covering either the parent or the child.

The most appropriate use of this statutory section permits unmarried parties to reach nonresident child support obligors through the use of long-arm jurisdiction that parallels the jurisdiction provided by the marital

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<sup>205</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992).

<sup>206</sup> The drafters attached no durational residency requirement to this aspect of the statute. Moreover, since they provided that the party seeking support could be either a resident or a domiciliary, courts may not be able to attach such a requirement outside the divorce context.

<sup>207</sup> See KY. REV. STAT. ANN. §§ 403.211-212 (Michie/Bobbs-Merrill 1984 and Supp. 1992) (child support in the context of divorce); *id.* § 406.011 (Michie/Bobbs-Merrill 1984) (child support in the context of paternity).

<sup>208</sup> The child's domicile would follow that of the custodial parent. See generally WEINTRAUB, *supra* note 30, at 13-14.

<sup>209</sup> Kentucky law terminates a child's right to support at his or her eighteenth birthday unless the child remains a high school student or is disabled. See generally GRAHAM & KELLER, *supra* note 4, § T23.03. Therefore, the child would not be eligible for support unless the school or institution had been chosen because of the child's disability or the child was under 18.

domicile section of the statute.<sup>210</sup> Used in this way, the statute applies to obligors who have clear minimum contacts and who have purposefully availed themselves of the benefits of Kentucky. For example, if Alex and Barbara live in Kentucky and have a minor child, Charles, Barbara may use Kentucky courts to sue Alex for child support even if she brings her claim after he leaves the state, as long as she does so within the statutory limitation period of one year. In this instance, federal due process requirements would not be offended by Barbara's suit because Alex might be found to have purposefully availed himself of Kentucky's benefits.<sup>211</sup> Although purposeful availing may be less obvious here than in the case of marital domicile, it nevertheless exists. Alex has maintained a parent-child relationship in Kentucky. That relationship gives rise to Alex's purposeful claim of state benefits. Alex may, for example, have claimed Charles as a tax dependent on a state income tax form. He might also have claimed visitation rights<sup>212</sup> or other rights arising from his relationship with Charles, whether or not the state sanctioned his relationship with Barbara.<sup>213</sup>

In other instances the connection between the Alex, Barbara, and Charles relationship and the forum may be less clear. Suppose, for example, that Barbara was an Alabama domiciliary who met Alex, a Kentucky domiciliary attending college in Alabama, at a social gathering in Alabama.<sup>214</sup> Alex saw Barbara often in Alabama and, after their relationship intensified, a child, Charles was born in Alabama. Less than one year later, after Alex graduated from college and moved permanently to Indiana (thereby changing his domicile),

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<sup>210</sup> See *supra* notes 44-52 and accompanying text.

<sup>211</sup> See *supra* notes 98-107 and accompanying text.

<sup>212</sup> See *Phillips v. Horlander*, 535 S.W.2d 72, 74 (Ky. 1975).

<sup>213</sup> Compare *Phillips v. Phillips*, 826 S.W.2d 746, 748 (Tex. Ct. App. 1992) (father's contacts in furtherance of parent-child relationship permitted assertion of personal jurisdiction over him) with *Dunlop v. Dunlop*, 564 So. 2d 618, 619 (Fla. Dist. Ct. App. 1990) (occasional visits and payments under URESA order did not support personal jurisdiction). The *Phillips* court noted that the inconvenience to the respondent, who resided in Kenya, was not increased by Texas litigation because travel from Kenya to Houston was easier than travel to the respondent's Mississippi domicile. Moreover, the court said that the respondent admitted that he had expected the petitioner to move to Houston when they separated. 826 S.W.2d at 720. But see *In re Marriage of Nobisch*, 6 Cal. Rptr. 2d 817, 821 (Cal. Ct. App. 1992) (where mother who registered Illinois decree in Texas sought to enforce Texas modification against California father, court held that Texas did not have personal jurisdiction over father); *Miles v. Perroncel*, 598 So. 2d 662, 670 (La. Ct. App. 1992) (Texas decree claiming personal jurisdiction did not accord due process to father whose only contacts with Texas were occasional visits with child).

<sup>214</sup> A Kentucky student at an out-of-state college may retain his Kentucky domicile. See *Broaddus v. Broaddus*, 280 S.W.2d 144, 144 (Ky. 1955).

Barbara moved to Kentucky and sued Alex for child support.<sup>215</sup> Barbara meets the wording of the statute<sup>216</sup> because at the time that she filed the support action she resided in Kentucky. In addition, Alex had been a Kentucky domiciliary within one year from the date on which the suit was brought. Unlike other applications of the long-arm statute, however, its use with this set of facts does not rest on any act within the state of Kentucky. All of the events leading to the establishment of the Alex-Barbara-Charles relationship occurred in Alabama. If the long-arm statute were the sole basis for asserting jurisdiction over Alex on these facts, it might be difficult to show that Alex's relationship to Charles meets both the requirement that a respondent have minimum contacts with a state and that the cause of action arise from those contacts.<sup>217</sup> Alex's Kentucky contact—his domicile within the state—has no necessary relationship to the parent-child relationship established in Alabama. That domicile, however, gives Kentucky general jurisdiction over Alex, who was subject to suit in this state for actions that arose while he was a domiciliary, even though he has now changed his domicile.<sup>218</sup>

Other factual circumstances may lead to a different result. If Alex were an Alabama domiciliary attending college in Kentucky, he would be

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<sup>215</sup> Because child support is a continuing obligation, it may be difficult to compare Barbara's post-conception move to Kentucky to other changes of domicile or residence by a petitioner after the event giving rise to the cause of action. In some cases the United States Supreme Court has found those changes insignificant because there was no evidence of forum shopping. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 319 (1981). In other cases, however, the application of a state's choice of law after such a move has been found to violate full faith and credit principles. See *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 181-82 (1936).

<sup>216</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992).

<sup>217</sup> See *Shaffer v. Heitner*, 433 U.S. 186, 213 (1977).

<sup>218</sup> See *supra* note 85 and accompanying text; see also *McDonald v. Mabey*, 243 U.S. 90, 92 (1917) (noting that summons left at last place of residence might suffice to establish jurisdiction over party who intended never to return). Another way to view the claim of personal jurisdiction over Alex is to recognize that the necessary nexus between the Kentucky forum and Alex may be found in reference to time rather than place. Thus, the issue is not where Alex and Barbara were located when the conception and birth occurred, but what relationship Alex had to Kentucky when those events transpired. Compare the traditional choice of law rule related to intestate distribution of movables, which requires application of the law of the decedent's domicile at the time of death. RESTATEMENT (SECOND) OF CONFLICTS § 314 (1971). For a case holding that domicile alone without acts occurring in the forum might not give rise to jurisdiction, see *Kroopf v. Guffey*, 228 Cal. Rptr. 807, 811 (Cal. Ct. App. 1986). See also *Holden v. Holden*, 542 A.2d 557, 560 (Pa. Super. Ct. 1988) (finding allegations that ex-husband's second wife induced him to breach settlement agreement in Texas were too tenuous to support Pennsylvania court's long-arm jurisdiction over her). One commentator has said that mere "technical" domicile might not be a sufficient connection on which to base personal jurisdiction. See WEINTRAUB, *supra* note 30, § 2.15B. In Kentucky, the ability to use the long-arm statute against a former domiciliary avoids the problem of KY. REV. STAT. ANN. § 454.165 (Michie/Bobbs-Merrill 1985), which bars the entry of a personal judgment against a nonresident not personally served within the state.



a Kentucky resident, whether or not he qualified as a domiciliary. Suppose that during that period Alex and Barbara conceived a child, Charles, in Alabama.<sup>219</sup> At the end of the school year, Alex left Kentucky, having graduated from college, and moved to Indiana. During the summer of that same year, Barbara moved to Kentucky. In this case, unlike the previous scenario, Alex is not subject to Kentucky's general jurisdiction since he was a resident, but not a domiciliary.<sup>220</sup> Jurisdiction here can only be based on the long-arm statute and its specifically affiliating connections, which include not only Barbara's current presence in the state but Alex's former residence in the state.<sup>221</sup> The necessary use of the long-arm statute increases the importance of a nexus between the former resident's connections to the state and the cause of action.<sup>222</sup> The respondent's residence in Kentucky is not clearly connected to the parent-child relationship if none of the acts associated with that relationship occurred in Kentucky. On the other hand, if some of those acts occurred in Kentucky, the former resident is not in the same position as a party whose only contact with a state was an occasional visit or phone call.<sup>223</sup>

Residence, however, covers a wide range of situations. In some cases the former resident's sojourn in the state may have been temporary. Alex, for example, might have been a transient worker in tobacco or the racing

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<sup>219</sup> If Alabama's paternity long-arm statute were similar to that in Kentucky, KY. REV. STAT. ANN. § 454.210(a)(8) (Michie/Bobbs-Merrill 1992), Barbara could claim jurisdiction over Alex in Alabama.

<sup>220</sup> In some cases it may be difficult to tell whether Alex is a resident or a domiciliary. The fact that Alex is not treated as a domiciliary for purposes of tuition at a state university does not necessarily mean that he would not be a domiciliary for purposes of child support enforcement. See generally WEINTRAUB, *supra* note 30, § 2.8. If Alex has pervasive connections with the state, he may be a former domiciliary under the statute. *Id.*

<sup>221</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992); see *supra* table accompanying note 150.

<sup>222</sup> See *Impola v. Impola*, 464 N.W.2d 296, 299 (Minn. Ct. App. 1990) (including source of cause of action and its connection with state among factors determining jurisdiction); *Kroopf v. Guffey*, 228 Cal. Rptr. 807, 810-11 (Cal. Ct. App. 1986) (discussing connection between activities and cause of action). Other sections of the general long-arm statute contain their own "arising from" limitations. See, e.g., KY. REV. STAT. ANN. § 454.210(a) (Michie/Bobbs-Merrill Supp. 1992) (jurisdiction based on paternity). The requirement is a constitutional one. See *Shaffer v. Heitner*, 433 U.S. 186, 213 (1977).

<sup>223</sup> See *Dunlop v. Dunlop*, 564 So. 2d 618, 619 (Fla. App. 1990) (Florida resident's occasional visits and child support payments to Georgia custodial parent did not provide adequate basis for personal jurisdiction). One might argue that Alex is Charles's parent while Alex resides in Kentucky, so Alex maintained a parent-child relationship there. Specifically affiliating jurisdiction normally depends on activity in a forum, as illustrated by active verbs such as "engage" in business, "commit" a tort, or "make" a contract. See KY. REV. STAT. ANN. § 454.210(b) (Michie/Bobbs-Merrill 1992). If Kentucky courts interpret Kentucky Revised Statutes section 454.220 to require similar activity by a former resident, they might supply the connection between the respondent, the forum, and the litigation. Perhaps that activity could be failing to provide child support while a forum resident. It is not entirely clear, however, that Kentucky would have a significant interest in protecting nonresident children.

industry rather than a full-time college student. If Alex spends four weeks grooming Thoroughbreds at Keeneland, one might ask whether it is fair to subject him to personal jurisdiction in this state if neither Barbara, the custodial parent, nor Charles, the child, resided in this state at the same time as Alex. The problem with claiming jurisdiction over Alex is not his lack of minimum contacts with Kentucky, but whether those contacts are sufficiently related to the litigation at hand. Thus, the new long-arm statute's possible constitutional problems arise from its failure to mirror the general long-arm statute in requiring that the cause of action arise from the respondent's contacts with the state.<sup>224</sup>

Kentucky's new long-arm statute<sup>225</sup> does not claim personal jurisdiction over absent obligors solely on the basis of the child's presence in the forum. Instead, the statute relies in every case on the respondent's former connection to the forum. However, there may be cases in which the statute's failure to require that the former resident's relationship to the child have some Kentucky contact makes its application unconstitutional.

#### IV BEYOND MINIMUM CONTACTS: DETERMINING THE APPROPRIATE IMPACT OF THE CHILD'S PRESENCE IN THE FORUM

The United States Supreme Court decision in *Burnham v. Superior Court*<sup>226</sup> not only upheld transient physical presence as the basis for personal jurisdiction, but also suggested that some assertions of personal jurisdiction need not be subjected to minimum contacts analysis.<sup>227</sup> Some proposals for reforming child support enforcement, encouraged by *Burnham* and motivated by the national need to provide adequate support for children, have argued that a child's presence in the forum should be sufficient grounds for assertion of personal jurisdiction over an obligor owing support for that child.<sup>228</sup> Kentucky's new long-arm statute does not yet take such an expansive position, but jurisdictional developments may affect both court interpretation and legislative amendment of the statute.

The fairness and efficacy of broad claims of personal jurisdiction cannot be assessed adequately without considering the relationship

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<sup>224</sup> See KY. REV. STAT. ANN. § 454.210 (Michie/Bobbs-Merrill 1985 & Supp. 1992).

<sup>225</sup> *Id.* § 454.220 (Michie/Bobbs-Merrill 1992).

<sup>226</sup> 495 U.S. 604 (1990).

<sup>227</sup> *Id.* at 610, 621-22.

<sup>228</sup> See *Tentative Recommendations of the U.S. Commission on Interstate Child Support*, 18 Fam. L. Rep. (BNA) 2001, 2001 (Mar. 3, 1992) (recommending that Congress find that state where child is domiciled satisfies due process when it claims personal jurisdiction over absent child support obligor).

between jurisdictional claims, choice of law rules, and problems of the enforcement of judgments. The fairness of a child support enforcement system with broad grounds for asserting jurisdiction over nonresident obligors may depend on whether the inconvenience to obligors can be justified. If such a system has no choice of law rules to limit the forum's ability to apply its own law, however, protective interests other than mere inconvenience may be implicated. Moreover, attention must be paid to the enforceability of any judgment rendered under a system of expanded jurisdiction. The enforcement of judgments advances both state and national interests. Examination of state interests related to child support may help define a system of expanded jurisdiction that operates both fairly and effectively. In addition, state interests may reveal other problems related to child support enforcement, and possible solutions.

For simplicity's sake, begin by considering two neighboring states and their relationship to a support obligor, a support recipient, and their child. If the parties in question are a married couple, the issue of child support is likely to be initiated in the context of divorce. Residency requirements will generally assure that the state in which the divorce is initiated is the domicile of at least one of the parties.<sup>229</sup> For our purposes we might consider one state, Kentucky, as the state of origin because it is the state in which the parties have their original contact with the court system. If Kentucky grants the parties a divorce, awards child custody, and establishes child support, it will probably do so without reference to a jurisdictional rule that depends on the child's presence. Either both parties will have consented to Kentucky as a forum, or the petitioner who has chosen the forum will be able to use the marital domicile portion of the new statute.<sup>230</sup> The petitioner's ability to use long-arm jurisdiction related to marital domicile will mean that the nonresident respondent had fairly recent minimum contacts with Kentucky.<sup>231</sup> Those contacts suffice to permit Kentucky to assert jurisdiction over the respondent; the child's presence in the forum is jurisdictionally irrelevant.<sup>232</sup> For never-married parties a similar result can be reached by reading the new statute as a long-arm statute that treats residing in the state in the parent-child relationship as similar to the marital domicile requirement.<sup>233</sup>

Even if the respondent has left the state and is now a nonresident living in another state, for example North Carolina, Kentucky should have

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<sup>229</sup> See *supra* note 21 and accompanying text.

<sup>230</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992).

<sup>231</sup> See *supra* notes 151-79 and accompanying text.

<sup>232</sup> See *supra* notes 98-107 and accompanying text.

<sup>233</sup> See *supra* notes 151-79 and accompanying text.

jurisdiction not only to make the initial support award, but also to make custody determinations and to modify child support under existing jurisdictional rules.<sup>234</sup> If the child and the custodial parent remain in Kentucky, it will continue to be the child's home state for purposes of custody determinations. Moreover, the traditional principles of continuing jurisdiction with regard to child support are likely to give the state the right to bring the obligor into court for modification purposes.<sup>235</sup>

The result is different if the obligor remains in Kentucky and the child travels with the child support recipient to North Carolina. Under current jurisdictional theories, an obligor not served while physically present<sup>236</sup> in North Carolina is not subject to the jurisdiction of that state's courts solely because her child lives there.<sup>237</sup> The presence of her child in that state is not a minimum contact that will satisfy the Due Process Clause, even if the obligor consents to the child's presence in the state and the state is an appropriate forum for the determination of custody because it is the child's home state.<sup>238</sup> Furthermore, if North

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<sup>234</sup> The Kentucky forum is likely to be the child's home state for purposes of the Uniform Child Custody Jurisdiction Act. See KY. REV. STAT. ANN. § 403.410(5) (Miche/Bobbs-Merrill 1984) (Kentucky's encoding of the Uniform Child Custody Jurisdiction Act). The Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1988), makes decrees rendered by states with significant connection jurisdiction enforceable and not subject to modification only if there was no home state that could have exercised jurisdiction. See *id.* § 1738A(c)(2)(B). If the child's home state enters a custody decree and also claims continuing jurisdiction, no other state may modify the decree while one party remains a resident of the rendering state. *Id.* § 1738A(d).

<sup>235</sup> Once a forum establishes appropriate long-arm jurisdiction, it may use continuing jurisdiction over the obligor to control support awards. *Matter of Spence*, 600 So. 2d 782, 783 (La. Ct. App. 1992); see also *In re Marriage of Weishaupt*, 514 N.E.2d 788, 791 (Ill. App. Ct. 1987) (extending long-arm jurisdiction to proceedings incident to marriage dissolution).

<sup>236</sup> See *supra* notes 226-27 and accompanying text.

<sup>237</sup> The use of the child's presence in the forum to establish a claim of personal jurisdiction over the absent obligor might be justified simplistically on the basis of the "status" exception to minimum contacts. That label has sometimes been asserted as the rationale for forum ability to determine child custody when the court lacks personal jurisdiction over one of the parties. See UNIF. CHILD CUSTODY JURISDICTION ACT § 12 cmt., 9 U.L.A. 274 (1987) (noting that personal jurisdiction over both parents is not necessary for child custody determinations). The same label has been used to explain *ex parte* divorce. The status exception to the need for personal jurisdiction over an absent respondent is related to the forum's compelling interest in applying its own law to provide the rule of decision. See *supra* notes 69-77 and accompanying text. *Ex parte* divorce was justified by the forum's need to use grounds it found acceptable so as to ensure the stability of marital status within its jurisdiction. Likewise, a child's presence alone may give a state the right to determine custody, but only in very limited situations. In most cases the Uniform Child Custody Jurisdiction Act requires more than the child's physical presence. See KY. REV. STAT. ANN. § 403.420(1)(a)-(d) (Miche/Bobbs-Merrill 1984). For example, the Act relies on the forum's status as the child's home state, requiring that the child reside in the state with a party claiming custody for at least six months. See *id.* § 403.420(1)(a). In Kentucky, a party cannot establish home state status by hiding a child in the state. See *Freeman v. Freeman*, 547 S.W.2d 437, 441 (Ky. 1977). Emergency custody jurisdiction, however, may be established by the child's presence in the state. See KY. REV. STAT. ANN. § 403.420(1)(e).

<sup>238</sup> A forum that may determine child custody is not necessarily empowered to determine child

Carolina cannot assert jurisdiction, its child support guidelines cannot be used to determine the standard for child support because a Kentucky court will not use the North Carolina rules to set support.<sup>239</sup>

Fair resolution of the jurisdiction issue involves two problems; determining whether it is appropriate for North Carolina to serve as the forum for establishing a child support order and determining whether the North Carolina guidelines should control the support standard. The lack of a choice of law function when child support is enforced through the use of long-arm statutes and the widespread use of a system in which jurisdiction determines choice of law<sup>240</sup> should not preclude such an assessment.

The normative value of jurisdictional rules based on the child's presence within the forum can be assessed by determining the interest of each state in serving as the forum and applying its own laws. By examining the interests of both states, some policy matters may be illuminated.

A state is most clearly interested in serving as a child support forum when the use of its judicial system is economically efficient. To judge that efficiency, assume first that the custodial parent remains with a child in the former marital domicile or in the state where the noncustodial parent formerly maintained a relationship with the minor child, in this example Kentucky. The child support obligor moves to another state, North Carolina. If the child support guidelines in Kentucky were the same as those in North Carolina and if the obligor had no dependents other than the single child in question, the interests at stake would be limited to the fairness of calling either party to litigate in a distant forum and the interest of each state in serving as a forum.<sup>241</sup>

Each party has an interest in having his or her residence serve as the forum in order to lower the personal cost of adjudication. However, the states involved do not have identical interests in the costs of adjudication. The costs of determining child support are absorbed by a forum state to the extent that parties are not required by statute to bear the entire burden of court costs.<sup>242</sup> A state that serves as a forum for setting child support

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support. See *In re Marriage of Mobley*, 569 N.E.2d 323, 324 (Ill. App. Ct. 1991); *Harris v. Harris*, 410 S.E.2d 527, 530-31 (N.C. Ct. App. 1991).

<sup>239</sup> See *Hall v. Hall*, 585 S.W.2d 384, 385 (Ky. 1979); *Larsen v. Dunn*, 474 N.W.2d 34, 39 (N.D. 1991).

<sup>240</sup> See WEINTRAUB, *supra* note 30, § 4.2.

<sup>241</sup> Removing differences between the two states' rules of decision eliminates the choice of law problem, which clearly exists in the real world. In addition, removal of other dependents eliminates state interests in residents other than the obligor.

<sup>242</sup> Although Kentucky law provides for the payment of costs, KY. REV. STAT. ANN. § 403.220

expends funds without a corresponding return unless its own residents benefit from the establishment of the child support order. Thus, in this scenario, North Carolina, in which no parties will benefit from the establishment of a support order, should prefer that Kentucky serve as the forum so that North Carolina can minimize its own costs.

Kentucky's interest in serving as a forum involves similar considerations. Kentucky should be willing to bear the costs of setting the child support award because the support ordered will inure to the benefit of a forum resident, reducing the potential for dependence on the public. This interest may be tempered by problems of enforcement: Kentucky might be more reluctant to serve as the forum if its order were not entitled to enforcement in North Carolina. Kentucky has no interest in setting its decision-making process in motion if the decision will be ineffective. The most efficient rule, therefore, would make Kentucky the forum for setting the child support obligation, and would require North Carolina to respect that obligation without modification.<sup>243</sup>

While current jurisdictional rules support the jurisdictional portion of an efficiency-oriented solution, they do not resolve the question of enforcement. Under current theory, a state in the position of Kentucky is indeed a forum that may set the child support obligation, using a long-arm statute similar to that adopted by Kentucky.<sup>244</sup> North Carolina has no personal jurisdiction over the obligee and cannot render a support order that binds her. North Carolina, however, is not required to respect the Kentucky order as to future child support obligations if the obligee seeks to enforce it there. Child support orders are subject to modification in a second forum to the same extent that they would be modifiable in the rendering state.<sup>245</sup> They are not entitled to full faith and credit because they are not treated as final judgments.<sup>246</sup>

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(Michie/Bobbs-Merrill 1984), some expenses of operating the justice system are not covered by fees assessed under this statute.

<sup>243</sup> Child support awards are modifiable prospectively in the state of enforcement. Many states claim power to modify child support awards even in a URESA context. See *In re Marriage of Aron*, 274 Cal. Rptr. 357, 359 (Cal. Ct. App. 1990) (California court may entertain modification motion as defense to enforcement); cf. *Taylor v. Head*, 594 A.2d 115 (Md. 1991) (finding mail service of wife's motion for child custody and support provided constitutionally sufficient jurisdiction). In Kentucky, however, responding courts do not have the power to modify child support obligations even at the request of the recipient. See *Commissioner ex rel Ball v. Musiak*, 775 S.W.2d 524, 526 (Ky. Ct. App. 1989). See generally Jane H. Gorham, Note, *Stemming the Modification of Child Support Orders by Responding Courts: A Proposal to Amend RURESA'S Antisupersession Clause*, 24 U. MICH. J. L. REF. 405 (1991). Orders modified in URESA proceedings do not affect a previously entered support award. See *In re Marriage of Casey*, 556 N.E.2d 271 (Ill. App. 1990).

<sup>244</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992).

<sup>245</sup> See *supra* note 243.

<sup>246</sup> See *White v. Bennett*, 553 S.W.2d 845 (Ky. 1977); *Bradley v. Bradley*, 214 S.W.2d 1001,

If the parties' locations are reversed but all other factors are constant, the state interests are the same. Suppose that the obligor remains in Kentucky, while the obligee moves herself and the children to another state, North Carolina. The same arguments that applied to North Carolina in the previous situation now apply to Kentucky. Kentucky has no interest in expending state funds to set child support because that expenditure will not benefit state residents. Moreover, Kentucky has no interest in enabling an obligor to avoid support payments. North Carolina, in contrast, has an interest in establishing child support because it will benefit local parties. Current jurisdictional rules do not permit North Carolina to serve as the forum on these facts.<sup>247</sup> If the sole connection between the obligor and North Carolina is the child's presence in the state, North Carolina cannot exercise personal jurisdiction over the obligor, even though it has stronger interests than Kentucky.

If both states would set identical obligations, the obligor's interest in avoiding the forum in which he does not reside relates only to the inconvenience of defending in a distant forum. Without differences in state child support laws, the obligor's state would have no stake in his private interest in litigating at home. Long-arm statutes that base personal jurisdiction on the nonresident's maintenance of a parent-child relationship in the state address this problem, although indirectly.<sup>248</sup> If an obligor comes to a state to maintain a relationship with his child, it is less likely that the child's state will be a truly inconvenient forum. Thus, while the child's presence in the forum is not alone a sufficient contact for personal jurisdiction over the obligor, the maintenance of the parent-child relationship in the state may constitute a sufficient contact. Applying this rule would produce an efficient solution, but only if Kentucky were forced to respect any North Carolina decree.

These examples show that where no state protective policies are at work and the only issue is the respondent's convenience, the state in which the obligee resides is the only interested state and the issue of which state should serve as a forum might be labeled a false conflict.<sup>249</sup> If the conditions met in this example reflected all legitimate state

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1001 (Ky. 1948).

<sup>247</sup> *Kulko v. Superior Court*, 436 U.S. 84, 93 (1978); see *supra* notes 98-102 and accompanying text.

<sup>248</sup> See, e.g., *Phillips v. Phillips*, 826 S.W.2d 746, 748 (Tex. Ct. App. 1992) (finding father's visits in furtherance of parent-child relationship provided constitutionally sufficient basis for jurisdiction). The proposed Uniform Interstate Family Support Act, § 201 (Draft 1992) [hereinafter "UIFSA"] requires that the obligor actually reside in the state with the child rather than merely visit a resident child.

<sup>249</sup> See *supra* note 70 and accompanying text.

interests, there would be no reason not to permit the assertion of personal jurisdiction over the nonresident obligor based on the child's presence in a state. States do have protective policies, however. Child support guidelines express not only an interest in protecting the child involved but an interest in the obligor, particularly when the rule affects other minor dependents of the obligor. Thus, most situations may not involve the false conflict hypothesized when only an obligor's convenience interest was affected.

Strong conflicts between state interests are often related to differences among standards of child support imposed in various states. All states have child support guidelines,<sup>250</sup> but those guidelines vary in important ways. Some important differences relate to self-support reserves for the child support obligor,<sup>251</sup> the choice of gross or net income as the basis for calculating the support owed,<sup>252</sup> the age at which child support may be terminated,<sup>253</sup> and the treatment of multiple families related to the same obligor.<sup>254</sup> In actions under the Uniform Reciprocal Enforcement of Support Act ("URESA"),<sup>255</sup> the responding court must use the law of the state in which the obligor resided or was present during the period for which enforcement is sought.<sup>256</sup> In contrast, neither agencies<sup>257</sup> nor courts applying child support guidelines<sup>258</sup> receive any choice of law directive. Thus, either tribunal is likely to apply its own law, especially when child support is set in the divorce context.

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<sup>250</sup> The Family Support Act of 1988, 42 U.S.C. §§ 662-67 (1988), not only requires such guidelines, § 666(a), but demands that they create a rebuttable presumption that the amount of support owed is the amount provided by the guidelines. *Id.* at § 667(b)(2). Courts deviating from the guideline are required to provide reasons for the deviation in writing. *Id.*

<sup>251</sup> See, e.g., N.Y. DOM. REL. LAW § 240(1-b)(6) (McKinney Supp. 1991).

<sup>252</sup> See, e.g., KY. REV. STAT. ANN. § 403.212 (Michie/Bobbs-Merrill Supp. 1992) (using gross income).

<sup>253</sup> In Kentucky, child support terminates at the age of 18 unless the child is a high school student. See *id.* § 403.213(3). In contrast, other states provide support beyond age 18. See, e.g., *Napolitano v. Napolitano*, 732 P.2d 245, 246 (Colo. Ct. App. 1986) (Colorado provides for support until age 21). A forum state will normally employ the age of majority under forum law. See *Early v. Early*, 484 N.W.2d 125, 128 (S.D. 1992) (applying South Dakota's age of majority over mother's claim that court should use age of majority in Colorado, where child resided), *cert. denied*, 113 S. Ct. 272 (1992).

<sup>254</sup> See Rebecca B. Garland, Note, *Second Children, Second Best? Equal Protection For Successive Families Under State Child Support Guidelines*, 18 HASTINGS CON. L.Q. 881 (1991).

<sup>255</sup> KY. REV. STAT. ANN. §§ 407.010-.480 (Michie/Bobbs-Merrill 1984).

<sup>256</sup> See KY. REV. STAT. ANN. § 407.150 (Michie/Bobbs-Merrill 1984). The URESA choice of law rule may have constitutional dimensions. The United States Supreme Court has said that a forum whose only connection to the litigation is the presence of the plaintiff in the forum may not apply its law as the rule of decision. See *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930).

<sup>257</sup> See KY. REV. STAT. ANN. §§ 405.405-.991 (Michie/Bobbs-Merrill Supp. 1992) (providing for administrative enforcement of child support).

<sup>258</sup> See *supra* note 250 and accompanying text.



Differences in the child support rules are important to the obligor if expanded jurisdictional statutes permit the assertion of personal jurisdiction over him in a forum whose rules demand a higher standard of support than that of his residential forum. In that case the risk of expanded jurisdiction to the obligor involves more than the inconvenience of defending in a different forum. Moreover, to the extent that the higher standard of support in the forum where the child resides deprives the obligor's other dependents of support, it may touch on an important interest of the state in which the other dependents reside. When child support standards differ among states, each state will have a strong interest in the application of its own law, either to protect the child or to protect the obligor.

Long-arm statutes that claim jurisdiction over an obligor based on prior contacts help a state to implement its protective policies. Suppose that Alex and Barbara reside in Colorado, a state that sets the age of emancipation for child support purposes at twenty-one.<sup>259</sup> If Alex leaves Colorado and moves to Kentucky, which uses an emancipation age of eighteen,<sup>260</sup> jurisdictional rules should deprive him of the advantage of Kentucky local law.<sup>261</sup> If Colorado has a long-arm statute similar to that of Kentucky, Barbara may sue Alex for child support in Colorado, and the local age of majority will apply. Problems arise only if Kentucky protects Alex by applying its local law to him.<sup>262</sup> As a general rule, Kentucky public policy exceptions will not prevent the enforcement of the Colorado judgment as long as Kentucky finds Colorado's exercise of jurisdiction to be consistent with due process.<sup>263</sup> Fairness dictates that neither Alex nor the state to which he has repaired should be able to deprive Barbara of child support that she might reasonably have expected to receive under the laws of the last marital domicile or the last location of the parent-child relationship.<sup>264</sup>

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<sup>259</sup> See *Napolitano v. Napolitano*, 732 P.2d 245, 246 (Colo. Ct. App. 1986).

<sup>260</sup> See KY. REV. STAT. ANN. § 403.213(3) (Michie/Bobbs-Merrill Supp. 1992).

<sup>261</sup> But see *Tucker v. Hill*, 763 S.W.2d 144, 144 (Ky. Ct. App. 1988) (applying Kentucky age of majority in child support action related to Indiana divorce decree). For an argument that *Tucker* was wrongly decided, see GRAHAM & KELLER, *supra* note 4, § T23.03 at 68 (Supp. 1991). Even under URESA Alex would lose the local law advantage if there were an outstanding Colorado support order for his child. If Kentucky modified the Colorado support order using its age of majority, that second URESA order would not supersede the first order. See *In re Marriage of Casey*, 556 N.E.2d 271, 272 (Ill. Ct. App. 1990) (holding judgment in URESA action does not alter obligations under original divorce judgment).

<sup>262</sup> *Tucker*, 763 S.W.2d at 145 (decided under URESA).

<sup>263</sup> Since Kentucky does not modify URESA orders as a responding state, it should not modify child support orders in this context. See *supra* note 243 and accompanying text.

<sup>264</sup> See *People v. One 1953 Ford Victoria*, 311 P.2d 480, 482 (Cal. 1957) (party expectations should affect choice of law).

The situation is different if Alex and Barbara begin their relationship as Kentucky residents. If Barbara takes the minor child to Colorado, personal service on Alex in that state would subject him to the jurisdiction of Colorado courts.<sup>265</sup> In addition, Colorado might use expansive rules of personal jurisdiction, claiming that the child's presence alone or combined with Alex's visits or telephone calls were minimum contacts sufficient for long-arm jurisdiction.<sup>266</sup> While proposals for changes in child support enforcement do not go so far as to make the presence of the child in Colorado the basis for jurisdiction,<sup>267</sup> they may achieve the same result by permitting the application of forum law and by guaranteeing enforcement to that judgment.

Under the proposed Uniform Interstate Family Support Act ("UIFSA"), the law of a state issuing a child support order supplies the rule of decision.<sup>268</sup> Moreover, if Colorado were the child's home state, the Act requires other states to defer to the Colorado forum and grants continuing and exclusive jurisdiction over modification of child support to that forum in many cases.<sup>269</sup> Thus, if Colorado issued the first order for child support, it could require the provision of support until age twenty-one, and enforcement of that order would be required in Kentucky if both states had adopted the Act.<sup>270</sup>

Thus result is accomplished through a combination of expanded jurisdiction and requirements for the enforcement of judgments consistent with the Act. The expanded jurisdictional bases include residing in the state with a child, residing in the state and providing prenatal expenses or support for the child, and a catch-all that allows a court to claim jurisdiction on any basis consistent with state and federal constitutional requirements.<sup>271</sup> If more than one child support proceeding is filed, the Act contains specific provisions for determining which state should resolve the dispute, giving preference to the child's home state.<sup>272</sup> Finally, a state that issues a child support order consistent with the Act

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<sup>265</sup> See *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990) (holding that state courts have jurisdiction over nonresidents physically present in state).

<sup>266</sup> See *Phillips v. Phillips*, 826 S.W.2d 746, 748 (Tex. Ct. App. 1992); *supra* notes 106, 213, 248 and accompanying text.

<sup>267</sup> See Uniform Interstate Family Support Act § 201(3)-(5) (Draft 1992) (basing jurisdiction on child's residence only if nonresident obligor lived with, supported, or caused the child to reside in that state).

<sup>268</sup> *Id.* § 604(a).

<sup>269</sup> *Id.* §§ 204(b), 205 (providing continuing exclusive jurisdiction unless all parties and child reside elsewhere).

<sup>270</sup> *Id.* § 207(a)(3).

<sup>271</sup> *Id.* §§ 201(3), (4), (8).

<sup>272</sup> *Id.* § 204 cmt. If there is no home state, a first-to-file rule controls.

retains continuing exclusive jurisdiction over modification.<sup>273</sup> The Act's choice of law provision reinforces the prohibition against modification by specifying that the law of the issuing state governs the standard of support.<sup>274</sup>

Unlike URESA, which uses the law of the obligor's state to set the standard for child support enforcement,<sup>275</sup> UIFSA will use the law of the child's home state to determine the standard of support. The URESA rule has been criticized as unfair to support obligees who were deserted by obligors fleeing to safe havens with lower support standards.<sup>276</sup> Similar unfairness may arise if expansive long-arm statutes permit claims of personal jurisdiction over obligors who have little connection with the forum other than the child's presence in the state. Just as Alex should not be able to lower the standard of child support by moving to a less generous state, Barbara should not be able to improve the standard by moving to a more generous state.<sup>277</sup>

The UIFSA rule does not eliminate the conflict between state interests when states have different child support standards, but its requirements for enforcement may eventually lead to higher standards for child support in all states. If states with lower standards are required to demand that local obligors pay higher child support for children who do not reside in the state, it may become easier for state legislatures to insist that the same level of support be provided to local children.

Multiple families give rise to one of the most difficult policy choices faced by states implementing child support guidelines.<sup>278</sup> In Kentucky, child support guidelines permit an obligor to deduct from gross income the amount of prior court-ordered child support if the obligor is current on the ordered obligation.<sup>279</sup> Thus, once an order is entered against an obligor, subsequent claimants take from an income reduced by the

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<sup>273</sup> *Id.* § 205.

<sup>274</sup> *Id.* § 604.

<sup>275</sup> See KY. REV. STAT. ANN. § 407.150 (Michie/Bobbs-Merrill 1984).

<sup>276</sup> See WEINTRAUB, *supra* note 30, § 5.2E4 at 256.

<sup>277</sup> There are several problems with attempting to provide fairness to both parties with a choice of law rule. First, not even the United States Supreme Court has federalized choice of law rules other than in cases involving fraternal insurance societies. See *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 589 (1947) (Full Faith and Credit Clause demanded that court apply law of state of association's incorporation). Second, a rule giving priority to the state with the most significant interest in the parties' relationship might be easy to apply in the case of previously married parties, but very difficult in the case of a more limited relationship or a chance encounter. Where, for example, is the state with the most significant relationship to parties who conceived a child at the site of the 1993 Super Bowl and went on to live in different states? Of course, choice of law would not be a problem if there were a national standard for child support.

<sup>278</sup> See Garland, *supra* note 254.

<sup>279</sup> KY. REV. STAT. ANN. § 403.212 (Michie/Bobbs-Merrill 1992).

amount of prior orders. The Kentucky rule may reflect a policy that "first families come first."<sup>280</sup> Other states, however, have indicated that all biological children of the same obligor should share equally in his or her disposable income.<sup>281</sup> If Alex and Barbara are living as a married couple domiciled in Kentucky before Alex's departure for North Carolina, Kentucky may now exercise personal jurisdiction over Alex.<sup>282</sup> In setting Alex's child support obligation, Kentucky will apply its own rule related to multiple families.<sup>283</sup> Assuming that there is no other order for child support, Alex's full gross income will be subject to the child support guidelines even if North Carolina, the state in which he now resides, would take account of his subsequent children. Alex and Barbara's situation may create a true conflict if Alex has a second family in North Carolina. Kentucky's claim to jurisdiction over Alex does not eliminate North Carolina's protective interest in Alex's second family.

The proposed Uniform Interstate Family Support Act addresses these problems through rules related to enforcement rather than jurisdiction. Under the proposed Act, North Carolina would be required to treat the Kentucky order for Alex's first family in the same manner as a local order.<sup>284</sup> If North Carolina generally treats all children of the same obligor equally, it may apply that rule to the Kentucky child support order. If Barbara moves to a state that treats all children equally, while Alex remains in a "first families first" state, she continues to enjoy the benefit of the first family rule since orders requiring support must be enforced in Alex's state. Alex's subsequent family receives no protection

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<sup>280</sup> Treating this option as a "first families first" rule may reflect a middle-class bias. A "first families first" rule expresses a world view in which family obligations arise from legal relationships that are entered into sequentially. In such a system a first family will have the first child support order because no subsequent marriage or children will ensue until after a divorce terminates the first marital relationship. When parent-child relationships do not arise from a marriage, however, the first child support order need not reflect birth order for children. In that context, a rule that takes account of prior court orders is not necessarily a "first children first" rule at all. For example, an obligor who has a child born while he is married to someone other than that child's mother may find that the first child support order entered refers to the later-born child. Discriminating against the later-born child on the basis of illegitimacy would violate equal protection constraints. See *Trimble v. Gordon*, 430 U.S. 672 (1977) (holding that statute denying opportunity for heirs born out of wedlock to prove paternity violates Equal Protection Clause). It is not clear, however, that subjecting *all* later-born children to a priority rule that preferred earlier children would violate equal protection. Cf. *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (holding Maryland ceiling on AFDC payments constitutional despite providing proportionately less aid for children in large families).

<sup>281</sup> See *Beasley v. Beasley*, 245 S.E.2d 820, 822 (N.C. Ct. App. 1978), *aff'd*, 251 S.E.2d 433 (N.C. 1979).

<sup>282</sup> KY. REV. STAT. ANN. § 454.220 (Michie/Bobbs-Merrill Supp. 1992); see *supra* notes 151-79 and accompanying text.

<sup>283</sup> KY. REV. STAT. ANN. § 403.212 (Michie/Bobbs-Merrill 1992).

<sup>284</sup> See Uniform Interstate Family Support Act § 208 (Draft 1992).

because they live in a state whose local law does not afford them that protection. Thus, the Act permits a state to apply local law when its purpose and focus relates to dependents of the obligor rather than to the obligor as an individual.

Setting fair child support obligations requires attention to the standard for child support, the appropriate reach of state jurisdiction, and the ability to modify orders once they have been entered. Recent proposals for change will affect two of those areas—expanded jurisdiction and modification of orders. The Uniform Interstate Family Support Act is directed primarily to problems of enforcement. Under that Act, once a child support order is entered, the issuing tribunal retains continuing and exclusive jurisdiction to modify the support order as long as the child or one of the parents lives in the state.<sup>285</sup> Like the Parental Kidnapping Prevention Act of 1980,<sup>286</sup> the new uniform act proposes to create a system in which only one state is empowered to issue enforceable orders.<sup>287</sup> Expanding jurisdictional rules will only increase the importance of this control. It remains to be seen whether uniform federal child support standards could eliminate other conflicts.

### CONCLUSION

Any expansion of jurisdictional rules that fails to take account of differences in state child support laws may have a significant effect on the ability of child support obligors to maintain a parent-child relationship, particularly when the custodial parent moves to a state whose law would impose greater obligations than the law of the state in which the parties formerly resided.

Each state, including Kentucky, is likely to exercise its long-arm jurisdiction to the fullest extent possible so as to command support for its own residents. The state benefits by shifting the burden of providing that support elsewhere. The long-arm jurisdiction inconveniences the obligor, but this may not be unduly unfair if he or she retains a connection to the forum state by maintaining the parent-child relationship there.<sup>288</sup> Where no parent-child relationship exists within the state, however, the Kentucky long-arm statute may go too far in relying on the respondent's former domicile or residence and the petitioner's current presence in the state.<sup>289</sup>

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<sup>285</sup> *Id.* § 205.

<sup>286</sup> 28 U.S.C. § 1738A (1988).

<sup>287</sup> UIFSA "aims, so far as possible, to allow only one support order to be effective at any one time." UIFSA, prefatory note at 4 (Draft 1992).

<sup>288</sup> See *supra* notes 106, 213, 248, 266 and accompanying text.

<sup>289</sup> See *supra* notes 151-79 and accompanying text.

Kentucky's new long-arm statute provides welcome relief from this state's inability to exercise personal jurisdiction in a number of instances that would have fallen within accepted constitutional parameters. The Kentucky General Assembly should consider the continued viability of Kentucky Revised Statutes section 454.165,<sup>290</sup> at least with respect to child support obligors, because that statute bars the assertion of general jurisdiction over a nonresident domiciliary who cannot be personally served within the state.<sup>291</sup>

The adoption of the new long-arm statute will not cure problems related to modification of child support obligations by other states. Thus, Kentucky courts might wish to consider whether the existence of personal jurisdiction alone should always result in the use of the Kentucky child support guidelines. The legislature must also pay close attention to the proposed Uniform Interstate Family Support Act,<sup>292</sup> which suggests the future of child support enforcement for the entire country.

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<sup>290</sup> KY. REV. STAT. ANN. § 454.165 (Michie/Bobbs-Merrill 1985).

<sup>291</sup> *Id.*

<sup>292</sup> See *supra* notes 275-84 and accompanying text.

